The Central Law Journal.

ST. LOUIS, APRIL 29, 1887.

CURRENT EVENTS.

THE PROBATE OF WILLS—IN THE LIFE-TIME OF THE TESTATOR.—The New York general assembly has under consideration a bill authorize the probate of wills in the life-time of the testator. The measure is advocated upon the following grounds, which are set out in the preample: "Whereas many vexatious and expensive contests are made over the probate of wills, to the damage of legatees and devisees, the diminution and delay in settlement of estates, the promotion of family quarrels and the occasion of much chicanery, bribery and false swearing, and it is desirable, so far as possible, to mitigate such evils."

This is quite a formidable array of evils certainly, but how, and to what extent they would be remedied by the proposed measure is by no means apparent. The bill provides that a testator may have his will proved in his life-time, and that when so proved, unless it shall be revoked by marriage, or the birth of a child, or by the execution of another instrument with the same solemnities as the will itself, or in other words, by a later will, it shall stand as his last will and be duly carried into effect after his death. We presume, of course, that the probate of the will must be in "solemn form," that all persons supposed to be interested in the succession must be duly cited, and required to show cause, if they can, why the will shall not be admitted to probate and carried into effect after the death of the testator.

We think the effect of a law like this would be to increase very considerably the well-known evils attendant upon contested successions. Whenever there existed any reasonable ground for such allegations, charges of fraud, of undue influence, of imbecility, of lunacy would at once be preferred, family quarrels would be prematurely precipitated, and *all* the dirty linen would be brought into open court to be washed before the multitude. These evils certainly exist to a scandalous extent under the present system. Under that proposed, they would be greatly multiplied. There would be no finality. The testator would assuredly discover from the developments of the trial that he had made one, two, three, or more mistakes, and that he must execute a new will. Pending its incubation, lying, and, slander and backbiting would flourish like a green bay tree. Legatees who, under the first will would receive little, would maneuver to get more under the new dispensation, and those who stand to receive large gifts would exhaust the arts of cajolery and chicanery to preserve the existing *status*. And then the question would be reopened and the battle fought over again with vastly increased virulence and acrimony.

We have always been of opinion that the devils in the scripture were wise in their generation when they objected to being tormented before the time, and so we think that, if a family is to be rent with dissension and tormented with the strife and anxiety incident to a "will suit," it should be at the last possible moment, and after the principal figure in the tragedy is safely ensconced under the daisies.

We would not have believed upon any less respectable authority than the *Albany Law Journal* that any legislative body would entertain such a proposition, but it seems that, sure enough, there *is* nothing new under the sun, that the gentleman who introduced the bill into the New York general assembly is not without a prototype, and that a similar bill was not only introduced into the Michigan legislature but actually passed.

It is just, however, to the State to add that the supreme court,[1] with admirable "horse sense" held that the statute was inoperative, and that the courts could not be called upon to administer it. The judge said, in delivering the opinion of the court; "I cannot conceive it possible that a proceeding can be dealt with as judicial, when the chief party to it will not be precluded by the decree from doing exactly as he might have done had the courts never been called upon to act at all." The court takes the pains to point out that no one is, under our law, the heir of a living person, that by the death of presumptive heirs new expectants may be introduced, and they in their turn give place to others, that it is always "upon the cards" that an estate

[1] Lloyd v. Wayne Circuit Judge, 56 Mich. 236; S. C., 56 Am. Reports, 378.

may even escheat to the State, that, especially in this migratory age and country, the testator may change his domicile and defeat the jurisdiction of the court whose aid he has invoked to register his intentions, that he may sell his property, or give it away, or fool it away and become bankrupt. The court says further: "It is a singular, and in my judgment a very unfortunate spectacle to see a man compelled to enter upon a contest with the hungry expectants of his own estate and litigate, while living, with those who have no legal claim whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases." All this is most righteous truth, and in the following sentence the court effectually disposes of the question. "The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs."

NOTES OF RECENT DECISIONS.

THE PROVINCE OF THE JURY—"SCINTILLA OF EVIDENCE" — ORDERING VERDICT.—The province of the jury and the circumstances under which the court can properly interfere therein is very thoroughly considered in an able opinion by Judge Speer of the United States Circuit Court for Georgia, in a case recently before that court.[1] The *gravamen* of the action was a question of negligence, but we are spared the necessity of considering any phase of that well worn subject by the fact that the court felt it to be its duty to order a verdict for the defendant. The propriety of such a course, when the court is satisfied by the evidence that it is the duty of the jury to render such a verdict, was the point so fully considered by the court. The court lays down the rule thus: "The question whether or not negligence existed is generally a question for the jury. It has been held that the case should always go to the jury: (1) when the facts which, if true, would constitute evidence of negligence, are controverted; (2) where such facts are not controverted, but where there migl t be a fair difference whether the inference of negligence should be drawn; (3) when at the same time the facts are in dispute, and the inferences to be drawn from them are doubtful. In other words, the question of negligence is for the jury when there is substantial doubt as to the facts, or as to the inferences to be drawn from them."

If, however, the evidence is such that, admitting all of it favorable to the plaintiff to be true, no fair inference can, under the law, be drawn that he ought to recover, it is then the right, and indeed the duty of the court, to decide the case by peremptory instructions. In some of the States, among others Georgia, the rule is that, if there is any material evidence, however slight, even a mere *scintilla* of proof, tending to support the demand of the plaintiff, the case must go to the jury, because they are the judges of the weight of evidence.[2] If this rule is carried to the extent of holding a verdict, even founded upon clearly inadequate evidence, absolutely conclusive, because it is the province of the jury to decide upon the weight of evidence, it is manifestly unjust, unreasonable, and even absurd; if, however, it means that the sanctity of jury trial must be preserved by permitting a verdict, clearly wrong, to be rendered, and then awarding a new trial, it only tends to increase expense, delay, and possible, and even probable failure of justice. The federal courts do not recognize this doctrine.

Mr Justice Clifford says:[3] "Judges are no longer required to submit a case to the jury merely because some evidence has been offered by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party adducing such evidence. Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally *no* evi-

[1] Hathaway v. East Tennessee, etc. Co., U. S. C. C. (Ga.), October Term, 1886; 29 Fed. Rep. 439.

[2] Mercier v. Mercier, 43 Ga. 323; Johnson v. Crawley, 22 Ga. 348; Stamper v. Hayes, 25 Ga. 546; Phillips v. Brigham, 26 Ga. 617.

[3] Commissioners v. Clark, 94 U. S. 278, 284.

dence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In older cases, the same conclusion is reached.[4] In the last cited case Mr. Justice Swayne says: "The practice is a wise one. It saves time and costs. It gives the certainty of applied science to the results of judicial investigations. It draws clearly the line which separates the province of the judge and jury, and fixes where it belong the responsibility which should be assumed by the court."

Without controverting this *dictum*, we may be permitted to question the assertion that "it gives the certainty of applied science to the results of judicial investigations." We hardly think that mathematical certainty can be predicated of anything connected with the administration of the law—except the costs. Mr. Justice Miller asks:[5] "Must the court go through the idle ceremony in such a case, of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd; and, accordingly, we hold the true principal to be that, if the court is satisfied that conceding the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the courts should say so to the jury."

The English practice it is almost unnecessary to say is in full accord with the doctrine on this subject held by the Supreme Court of the United States.[6] In several of the American States the ancient rule of throwing everything to the jury if there is a scintilla of evidence, is renounced as in Maryland, Missouri and New York. The practice is undoubtedly a most fruitful source of new trials, mistrials and improper verdicts. In the case under consideration the court concludes its remarks on this subject thus: "The experienced and able judges who preside int he courts of the State, qualified to sift testimony, experts in the detection of fraud and falsehood, unprejudiced, are absolutely powerless to aid the jury to ascertain the truth, and to make a proper verdict. Thus the people are in a large measure deprived of the best results of the skill, training and experience of their judges. The judge may lay down general instructions as to the law. Here he must stop. In the language of a gifted publicist of the day, Mr. Thompson, the author of the Law of Negligence:

'Such a system is scarcely more wise than it would be to select a lawyer, a doctor, a clergyman, a farmer, a merchant, a carpenter, a shoemaker, a blacksmith, a saloonkeeper, a street-car-driver, a capitalist, or a barber, constitute them a ship's crew, and start them out on a voyage in company with an experienced navigator, who is permitted to give them general instructions on the theory of navigation, but who is prohibited from giving them any positive order how to navigate the ship, and from correcting any blunders they may make in navigating it.'

My own opinion is that the terrible burden born by the supreme appellate court of the State is largely traceable to this injurious statute."

[4] Parks v. Ross, 11 How. 378; Hickman v. Jones, 9 Wall. 197, 201; Merchants' Bank v. State Bank, 10 Wall. 604, 637.

[5] Pleasants v. Fant, 22 Wall. 116, 121, 122.

[6] Jewell v. Parr, 13 C. B. 196; Toomey v. London, etc. Co., 3 C. B. (N. S.) 150; Wheelton v. Hardisty, 8 El. & Bl. 262.

STOPPAGE IN TRANSITU — WHAT CONSTITUTES DELIVERY TO THE VENDEE.

1. How Long the Right Continues.
2. Delivery on Vendee's Vessel or Wharf.
3. Delivery to Warehouseman.
4. Delivery to Forwarding Agent.
5. Interception of Goods by Vendee.
6. Part of Goods not Delivered.
7. Attachment Laid by Vendor.
8. Attachment at Suit of Third Party.
9. Assignment of Bill of Lading.

1. *How Long the Right Continues.*—The right of stoppage *in transitu*, to be exercised by the vendor of goods on credit, upon discovering the insolvency of the vendee, only continues, as the phrase implies, while the goods are in actual course of transmission from the former to the latter. If they have arrived at their place of ultimate destination, and have come into the real or constructive possession of the purchaser, or of

some agent authorized to act in respect to the disposition of them otherwise than by merely forwarding them to the vendee, then the transit is at an end, the seller has no longer a right to retake them, his anomalous control over them is terminated by the change of possession, and he must fall back upon the other remedies which the law gives him as against the insolvent purchaser.[1] Without stopping to examine the foundation of this right, or the peculiar character of the vendor's lien upon the goods, it is our present purpose to ascertain what will constitute such a delivery, actual or constructive, to the vendee, as to defeat the right. Of course, if the purchaser acquires actual, manual control of the thing purchased, and places it in his shop or warehouse, there can be no difficulty in recognizing the delivery to him. But in regard to other modes of acquiring possession—and especially where it is constructive—questions of some nicety occasionally arise.

2. *Delivery on Vendee's Vessel or Wharf.*—The right of stoppage in transit does not exist after the goods have been delivered on board of the vendee's vessel, by which they are to be carried to another port.[2] For where the owner sends his own servant for the goods, delivery to the servant is a delivery into the actual possession of the master. And it is therefore held that, if the buyer sends his own vessel, or his own cart, for the goods, they have reached the buyer's actual possession, and the right of stoppage *in transitu* has ceased, as soon as the seller has delivered them into the vessel or cart.[3] So, also, the landing of goods upon a wharf is delivery, terminating the transit and divesting the vendor's right of stoppage, when by such landing all the duties and responsibilities of the transportation line in regard to the goods cease, and no duty or responsibility is cast upon the wharfinger, and the goods lie on the wharf subject to the control and direction of the consignee only, and it appears that merchants in the course of business received their goods at the wharf.[4]

3. *Delivery to Warehouseman.*—Where goods are, by the direction of the vendee, delivered by the carrier to a particular warehouseman, the question, as to whether the right of stoppage *in transitu* still continues, depends upon the question as to the capacity in which the warehouseman received the goods, whether as the agent of the vendee, or of the carrier, and this is for the jury.[5] Thus, where the consignee of certain boxes of merchandise agreed that they be by it set aside in its depot to be sold, and the proceeds used to pay past due freights, the balance, if any, to go to the consignee, it was held that this would not be such actual delivery as to prevent a stoppage in transit by the consignor.[6] Again, the right continues while the goods remain in the hands of a warehouseman, though at the place to which they were directed to be sent, if that be an intermediate point between the place of sale and the ultimate destination of the goods.[7] But if the vendor give the vendee an order for the delivery of the goods, upon the storekeeper in whose possession they are, and the goods are turned out to the vendee by the storekeeper, and marked with the vendee's initials on presentment of the order, the vendor's right of stoppage is determined.[8] But where goods are placed in the public store, or bonded warehouse, under the warehousing system (either in this country or in England), after a perfect entry of them for that purpose, they are to be considered as having come to the possession of the vendee, at the place where he intends they shall remain until he gives further order for their disposal; and the law recognizes his right to sell or dispose of them as he pleases, subject only to the custody of the officers of the revenue for the security of the payment of the duties, etc.; and in such a case the right of stoppage in transit should be considered at an end the moment the goods are thus deposited.[9]

[1] Coates v. Railton, 6 B. & C. 422; Cabeen v. Campbell, 30 Pa. St. 254; Mohr v. Railroad, 106 Mass. 67; Blackman v. Pierce, 23 Cal. 508; Aguiree v. Parmelee, 22 Conn. 473; Chandler v. Fulton, 10 Tex. 2; Thompson v. Railroad, 28 Md. 396.

[2] Pequeno v. Taylor, 38 Barb. 375. But in Parker v. McIver, 1 Dessau. 274, it was thought that delivery of goods to the captain of a ship, fitted out by the purchaser solely, is not such a delivery as to take away the vendor's right to stop the goods in transit.

[3] Ogle v. Atkinson, 5 Taunt. 759; Turner v. Trustees, 6 Exch. 543; Thompson v. Stewart, 7 Phila. 187.

[4] Sawyer v. Joslin, 20 Vt. 172.

[5] Hoover v. Tibbitts, 13 Wis. 79.

[6] Macon & Western R. R. v. Meador, 65 Ga. 705.

[7] Covell v. Hitchcock, 23 Wend. 611.

[8] Hollingsworth v. Napier, 3 Caines, 182.

[9] Mottram v. Heyer, 5 Denio, 632; Cartwright v. Wilmerding, 24 N. Y. 537.

4. *Delivery to Forwarding Agent.* — A vendor's right of stoppage *in transitu* is not terminated by the fact that the goods have come to the hands of a shipping agent appointed by the vendee, although they are delivered to him to await further directions, in respect to the time and mode of shipment to the vendee, when such shipment is to be made to an ultimate destination previously fixed and not to be affected by such subsequent directions; for the transit continues until the goods come to the possession of the purchaser or of some agent authorized to act in respect to the disposition of them otherwise than by merely forwarding them.[10] That is, when an intermediate delivery occurs, before the goods have reached their ultimate destination, if the party to whom they are deliverd has authority to receive them and give them a new destination, not originally intended, the transit is at an end; but if the middleman is a mere agent to transmit the goods in accordance with original directions, the vendor's right continues.[11] So where goods are delivered at a place where they will remain until a fresh impulse is communicated to them by the orders and directions of the purchaser, the transit is terminated.[12] And when goods have reached the destination agreed upon between buyer and seller, and are there delivered to the buyer's order, the right of stoppage, thus determined, is not revived or prolonged by his ordering them to be dispatched to a further point.[13] Goods are in transit when in the hands of a carrier for local delivery.[14]

5. *Interception of Goods by Vendee.*—If the vendee intercepts goods forwarded to him, on their passage and before they reach the intended destination, and gains possession of them as owner, the delivery is complete and the right of stoppage *in transitu* is gone.[15] For the crucial test is the acquisition of *possession* by the purchaser—not that the goods should have been delivered to him in the usual course of business, or by an authorized carrier, or at a specified place.

6. *Part of Goods not Delivered.*—Although a portion of the consignment of goods may have reached their ultimate destination and have been delivered into the actual possession of the purchaser, yet if the residue is still in process of transmission, the vendor's right of stoppage continues as to that residue, and he may lawfully retake it at any time before final delivery, upon learning of the buyer's insolvency.[16]

7. *Attachment Laid by Vendor.*—Suppose the vendor, becoming alarmed as to his prospect of payment for the goods sold, levies an attachment upon them, while they are still in course of transmission, and before they have reached the purchaser, on the ground of the vendee's fraud or false pretenses in procuring the credit. Will this amount to a waiver of his right to stop them in transit? Or is the one remedy defeated, by operation of law, upon the exercise of the other? The authorities on this point are not agreed. It has been held that, if the seller seizes the goods sold while in transit, by process of attachment, the right of stoppage *in transitu* is thereby destroyed.[17]

But a recent Texas decision holds that, although a seller of goods, by attaching them for debt while in transmission, will lose his right of stoppage, yet, if he had supposed that right was already terminated, and immediately on learning his error dismissed the attachment, he may still exercise the right of stoppage if otherwise proper.[18] And a still later case in that court (overruling prior decisions) holds that, the basis of the right to stop goods in transit being the insolvency of the vendee, that right is not waived by a seizure of the goods by the vendor, under a writ of attachment issued upon allegations that the goods were obtained

[10] Harris v. Pratt, 17 N. Y. 249.

[11] Cabeen v. Campbell, 30 Pa. St. 254; Pottinger v. Hecksher, 2 Grant, 309; Hays v. Mouille, 14 Pa. St. 48; Markwald v. Creditors, 7 Cal. 213.

[12] Becker v. Hallgarten, 86 N. Y. 167; Guilford v. Smith, 30 Vt. 49; Biggs v. Barry, 2 Curt. C. C. 259.

[13] Brooke Iron Co. v. O'Brien, 135 Mass. 442. In the absence of any understanding to the contrary, the employment of a carrier by a seller of goods on credit constitutes all middlemen, into whose custody they pass, agents of the seller for their transportation and the goods are deemed in transit until the complete performance of the carrier's whole duty: Calahan v. Babcock, 21 Ohio St. 281.

[14] White v. Mitchell, 38 Mich. 390.

[15] Jordon v. James, 5 Ham. 88; Secomb v. Nutt, 14 B. Mon. 324.

[16] Buckley v. Furniss, 17 Wend. 504.

[17] Woodruff v. Noyes, 15 Conn. 335; 5 Wait, Ac. & Def. 616; Bishop on Contr. 661; Halff v. Allyn, 60 Tex. 278. The decision last cited, however, was overruled in later cases in the same court.

[18] Fox v. Willis, 60 Tex 373.

upon false pretenses. "It seems to us," say the court, "that that rule cannot be sustained on any other theory than that, by stopping the goods in transit, the vendor rescinds the contract of sale. If this be not the effect of that act, we do not see how, in ordinary cases, the assertion of the right to have the price of the goods paid by their sale through an attachment suit, is inconsistent with the right to stop the goods in transit in any lawful manner."[19]

8. *Attachment at Suit of Third Party.*— But whatever may be the case in regard to an attachment laid by the seller himself, it is well settled, upon the authorities, that the levy of an attachment, at the suit of any general creditor of the purchaser, upon goods which are on their way from the vendor to an insolvent vendee, will not amount to a delivery to the vendee, nor will it terminate the *transitus*, nor otherwise defeat or impair the seller's right to stop and retake them.[20] Thus, it is said: "This right is based upon the just and equitable rule of law, that the property of one man shall not be taken to pay another man's debts, and is recognized in all civilized countries. We think it is equally well settled that this right cannot be impaired or extinguished, during its existence, by the acts or interference of a third party, but will follow the goods and attach to them. Hence, it is held that the seizure of such goods by an officer, under legal process in favor of some other creditor, does not destroy the right, but that the vendee may follow the officer and retake the goods."[21] So the right of stoppage *in transitu* cannot be impaired by service of garnishment on the carrier.[22] Nor is the right affected by an assignment of the goods for the payment of the vendee's debts; the assignee stands, in this respect, in the same place his assignor occupied.[23]

9. *Assignment of Bill of Lading.*—"But suppose the consignee has received the bill of lading of the goods, deliverable to him or his assigns, or indorsed to him or his assigns, by the consignor, and has assigned the bill by indorsement to a *bona fide* third party, then the vendor's right to stop the goods *in transitu* and hold them as security for the purchase money is defeated, and the assignee of the bill acquires as perfect a title to the goods, although they have not reached the buyer's hands, as if they had actually passed through his hands and been delivered bodily to him. This was decided in the leading case of Lickbarrow v. Mason, and may now be regarded as the settled law of England and of the United States."[24] But if the bill of lading was obtained by fraud, the transferee can secure no stronger rights than his indorser had.[25] And the sub-purchaser's knowledge of the insolvency of the original vendee will bear on the question of his good faith.[26]

H. Campbell Black.

[19] Allyn v. Willis (Sup. Ct. Tex. 1885), 21 Reporter, 349.

[20] Mississippi Mills v. Union Bank, 9 Lea, 314; Wood v. Yeatman, 15 B. Mon. 270; O'Brien v. Norris, 16 Md. 122; Mason v. Wilson, 43 Ark. 172.

[21] Chicago, etc. R. R. v. Painter, 18 Reporter, 347; 15 Neb. 394.

[22] Chicago, etc. R. R. v. Painter, *supra*.

[23] Harris v. Hart, 6 Duer, 606.

[24] 2 Daniel on Nego. Instr. § 1730; Lickbarrow v. Mason, 6 East, 21; 2 T. R. 63; Lee v. Kimball, 45 Me. 172; Dows v. Greene, 32 Barb. 490; 1 Smith's Lead. Cas. 895.

[25] Dows v. Perrin, 16 N. Y. 325.

[26] Loeb v. Peters, 63 Ala. 243; 35 Am. Rep. 17. And see Castanola v. Railroad, 24 Fed. Rep. 267.

LIFE INSURANCE — WARRANTIES — REPRESENTATIONS — CONDITION PRECEDENT — PLEADING—EVIDENCE—NOTICE.

CONTINENTAL LIFE INSURANCE COMPANY V. ROGERS.

Supreme Court of Illinois, January 25, 1887.

1. *Warranty or Representation.*— If a statement, absolutely a warranty, is followed by a further statement that, if the policy has been obtained by fraud, concealment or misrepresentation, it shall be utterly void; answers honestly made and not material to the risk will not vitiate the policy.

2. *Burden of Proof.*—The falsity of matters which appear in the application must be alleged and proved by the defendant as matters of defense.

3. *Conditions Precedent.* — Warranties in general are not conditions precedent. Such conditions are those which the plaintiff undertakes shall be fulfilled. These he is bound to aver and prove their performance.

4. *Pleading.*—The plaintiff must, in his declaration, aver the making of the policy—its terms, the payment of the premium, the death, the notice, and proof of the death. These averments, if established, constitute a *prima facie* case.

5. *Evidence — Waiver.* — It is never necessary to prove the performance of a condition which has been waived. A condition once waived is forever gone.

MULKEY, J., delivered in the opinion of the court:

The appellee, Caroline S. Rogers, recovered a judgment in the superior court of Cook county against the Continental Life Insurance Company, for $5,522.50, on a policy of insurance issued by the company to the plaintiff upon the life of her husband, Herbert S. Rogers. The policy is in the usual form, and bears date May 23, 1881. On the defendant's appeal, the judgment was affirmed by the appellate court for the first district, and the company thereupon appealed to this court. The declaration is in *assumpsit*, and contains two counts. The first is a special count, setting out the policy and application *in hæc verba*, followed by the usual averments in such cases. The second is a consolidated common count for money had and received, for interest, and for money due on an account stated. The plea of *non-assumpsit* alone was filed to the whole declaration.

The plaintiff, being sworn as a witness in her own behalf, testified that she was the wife of Herbert S. Rogers at the time of making the policy; that he died on the sixteenth of December, 1883, at Minneapolis; that she found the policy, together with the company's receipts showing payments of the premiums, among his papers, which were produced in court, and put in evidence. The application, being in the possession of the defendant, was not offered in evidence by plaintiff, or indeed, by either party; nor had the defendant been served with any notice to produce it on the trial other than that which may be implied by law from the bringing of the suit, and setting it out in the declaration.

The policy offered in evidence contained the following provisions:

"Provided, always, and it is hereby declared to to be the true intent and meaning of this policy, and the same is granted by the company and accepted by the assured upon the following express conditions and agreements: * * *

"*Second.* That the answers, statements and declarations, contained in or indorsed upon the application for this insurance, which application is hereby referred to and made part and parcel of this contract, as if fully recited herein, and upon the faith of which this agreement is made, are warranted by the assured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, said policy shall be absolutely null and void. * * * * * *

"*Seventh.* That no claim shall exist under this policy unless due notice and satisfactory proof of death shall be presented in writing to the officers of said company at the home office in Hartford, Connecticut, within two years after the death of the person whose life is hereby insured."

In addition to this, the application, which is signed by the company as well as the assured, contains the following provision: "And it is hereby covenanted and agreed that the statements and representations contained in this application and declaration shall be the basis of and form part of the contract, or policy of insurance, between said party or parties signing this application and the said Continental Life Insurance Company, which statements and representations are hereby warranted to be true; and any policy which may be issued upon this application by the Continental Life Insurance Company, and accepted by the applicant, shall be so issued and accepted upon the express condition that, if any of the statements or representations in this application are in any respect untrue, or if any violation of any covenant, condition, or restriction of the said policy shall occur on the part of the party or parties signing this application, then the said policy shall be null and void, and all money which shall have been paid on account of said policy shall be forfeited to the said company."

The plaintiff, then, for the purpose of showing that notice had been given and proofs made of Rogers' death, put Stewart Marks, the general manager of the company for its northwestern department, upon the stand, who testified, in substance, that certain blanks were sent to Mr. Williams, the company's agent at Minneapolis, for the purpose of making out such proofs; that they were subsequently handed to him by Mr. Smith, the plaintiff's attorney, to be forwarded to the company at its home office; that he could not answer whether he had sent them, because he was not able to find he had done so from an examination of his letter-book; that, ordinarily, as a matter of convenience to policy-holders, he sent such proofs to the home office; that Maj. Henry P. Barton, superintendent of the company's agencies generally, has charge of the settlement of policies when deaths occur, and was such superintendent in January, 1884; that witness met Maj. Barton and plaintiff's attorney in Grannis block, in reference to this claim, and several conversations were had about it. Mr. Smith, plaintiff's attorney, then testified as follows: "I delivered them (the proofs) to Stewart Marks under this policy. They were delivered to him by me on the first of January, 1884, to the best of my recollection. The day before this suit was commenced I was notified by Mr. Marks that Maj. Barton was here, and would like to meet me at their office in reference to this matter. They declined to pay it. Didn't put it on any ground, but simply declined to pay it. Said he would give me the amount of money the man had paid them."

Upon this state of facts the court refused, upon the defendant's application, to either exclude the evidence from the jury, or to instruct them to find for the defendant. The defendant declined to offer any evidence, and the cause was submitted upon the foregoing evidence, with the result already stated.

It is earnestly contended by appellant's counsel, that the trial court erred in refusing to instruct the jury to find for the defendant, or to exclude the evidence from the jury. This contention is based upon

four distinct propositions, which, if true to the extent claimed, clearly justify the conclusion which counsel draws from them. These propositions are as follows: (1) That the plaintiff, by setting the application out in the declaration, makes it a part of the same, and that the legal effect of it is the same as if every fact therein stated had in the ordinary way been expressly averred. (2) That the matters and things set up in the application, being declared both in the policy and application to be a part of the contract, and being also expressly warranted by the assured "to be true in all respects," are, by the terms of the contract itself, made "material," or, in other words, are made "warranties," without regard to whether they were in fact material to the risk or not. (3) That the answers, statements, and representations in the application being warranties, they are conditions precedent to a recovery, and the plaintiff was bound to prove them, regardless of their form, nature, or character, to justify a recovery. (4) It is the settled law and practice in this State, that where no evidence has been offered to prove any material allegation in the declaration put in issue by the pleadings, and not admitted for the purposes of the trial, or otherwise waived or dispensed with, the court should, on motion, exclude the evidence offered on other issues in the case, or direct the jury to find for the defendant.

The last proposition is fully sustained by the decisions of this court, and may be admitted to be true without qualification. Frazer v. Howe, 106 Ill. 563; Abend v. Terre Haute, etc. R. Co., 111 Ill. 202.

The first proposition is also equally true, and is so elementary in its character as to require no authority in its support.

With respect to the second proposition it is believed it cannot be maintained as universally true without some qualification. It is, however, generally true that, where the application is expressly declared to be a part of the policy, and the statements therein contained are warranted to be true, as was the case here, such statements will be deemed material, whether they are so or not; and if shown to be false, there can be no recovery on the policy, however innocently made, and notwithstanding their falsity may have no agency in causing the loss, or producing the death of the assured. Ripley v. Ætna Ins. Co., 30 N. Y. 136; O'Neil v. Buffalo Fire Ins. Co., 3 N. Y. 122; Barteau v. Phœnix Mut. Life Ins. Co., 67 N. Y. 595. While this is true as a general rule, still there are cases to be found in which the statements in the application have been held to be representations merely, notwithstanding they were expressly declared to be warranties, as they are here.

Thus, in Fitch v. American P. L. Ins. Co., 59 N. Y. 557, which was an action on a life policy, and the defense an alleged breach of warranty by the assured in untruly answering certain questions in the application, the policy, among other statements, contained the following: "Fraud or intentional misrepresentation violates the policy; and the statements and declarations made in the written application for this policy, and on the faith of which it was issued, are warranties in all respects true, and do not suppress or omit any fact relative to the insured affecting the interest of the company, or which, whether material or not, would tend to influence the company in taking the risk." In the concluding part of the application occurs the following: "I, the undersigned applicant, * * * do hereby declare that the preceding answers to the annexed questions, and written statements in the preceding statement, declaration, or warranty, together with the statements made to the examining physicians, are warranties correct and true, * * * and shall be the basis and form part of the contract or policy between the undersigned applicant and the said company; and, if not in all respects true and correct, the policy shall be void." It is also further said in the policy that the same is issued and accepted "in entire, unconditional honesty and good faith, and with the just intent of scrupulously fulfilling all the conditions and engagements of the contract with absolute certainty," etc. Under this state of facts one of the questions made in the case was whether the statements in the application were warranties or merely representations, and it was held they were the latter. The conclusion reached seems to have been placed mainly on two grounds, namely: (1) Because the good faith and honest intentions of the contracting parties are so studiously and conspicuously kept in the foreground of the transaction; (2) it was thought that, because of the frivolous character of many of the questions and answers, and the difficulty, if not possibility, of proving many of them after the death of the assured, it could not have been intended to give them the force and effect of absolute warranties.

As to the first ground of the decision, it was certainly a work of supererogation, so far as the insured was concerned, to make any reference whatever to his good intentions, honest purposes, etc., if, as was claimed, his answers and statements were all warrants binding him absolutely, without regard to whether they were made honestly or dishonestly.

Both of the elements forming the basis of the decision in that case are clearly present in this. Thus, the statement in the policy that the answers, statements, etc., in the application, etc., "are warranted by the assured to be true in all respects," is followed by the additional statement "that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, said policy shall be absolutely null and void." It is clear, the fraud, concealment, and misrepresentation here contemplated can have no application to anything other than the answers to the questions in the application. If true and full answers, there could be neither fraud, concealment, nor misrepresentation; and, if not full and true, upon the hypothesis they were warranties, the insured would incur a for-

feiture of the policy, whether there was any intentional misrepresentation or suppression of the truth or not. If the answers, however, are simply representations, as contradistinguished from warranties, in the technical sense of those terms, then such of the answers, nor material to the risk, as were honestly made in the belief they were true, would not be binding upon the assured, or present any obstacle to a recovery. It is clear, therefore, the only way in which to give that provision of the policy relating to fraud, concealment, and misrepresentation any effect at all, is by treating the answers in the policy as mere representations, and not warranties. If so treated, any defense founded upon an alleged misrepresentation or fraudulent concealment, it is clear, would have to be set up and proved by the company. And is this not more in consonance with the presumed intentions of the parties than the opposite view? Turning our eyes to the policy, we find the assured is exhaustively examined with respect to his afflictions through life, in the way of diseases. Each disease is specifically pointed out and called to his attention in a separate interrogatory. Question follows question, until the number of of diseases brought in review amounts altogether to twenty-four, which is followed by just that number of categorical answers. Some of the diseases in this imposing list are of such a character that most persons afflicted with them would naturally shrink from giving publicity to the fact, and consequently no proof could be made after their death one way or the other. Again, he is asked the condition of his father's mother's health previous to her death, and he answers he does not know. Now, suppose this answer is to be regarded as a warranty, and that the plaintiff is bound to prove, it is claimed, the truth of it as a condition precedent to a recovery, is it not clear nore covery could be had at all, for from the very nature of the answer no proof could be made about it after his death? Moreover, this fact was just as well known to the parties at the time as it was after the assured's death. The question then arises, ought a construction to be accepted as the true one which will lead to such consequences, when another reasonable construction can be adopted which will not lead to such results, and will, moreover, give effect to all the provisions of the policy, which the opposite construction clearly would not? We think not.

But leaving this all out of the question, whatever may be the holding of other courts on the subject, the rule seems to be well settled in this State that it is not necessary for the plaintiff, in an action on a policy, to either allege or prove such matters as appear in the application only. To be availed of as a defense, without regard to whether they are warranties or representations merely, their falsity or breach by the assured must be set up and proved by the defendant as a matter of defense: Herron v. Peoria M. & F. Ins. Co., 28 Ill. 235; Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354; Mutual Ben. Life Ins. Co. v. Robertson, 59 Ill. 123; Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35.

The same view is taken by the United States Supreme Court in Piedmont Ins. Co. v. Ewing, 92 U. S. 377. It is there said: "The number of questions now asked of the assured in every application for a policy, and the variety of subjects and length of time which they cover, are such that it may be safely said no sane man would ever take a policy if proof, to the satisfaction of a jury, of the truth of every answer were made known to him to be an indisputable prerequisite to payment of the sum secured; that proof to be made only after he was dead, and could render no assistance in furnishing it. On the other hand, it is no hardship that, if the insurer knows or believes any of the statements to be false, he shall furnish the evidence on which that knowledge or belief rest. He can thus single out the answer whose truth he he proposes to contest; and if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded. The judge of the circuit court was, therefore, right in refusing to instruct the jury that the burden of proving the truth of these answers rested with the plaintiff below."

The view taken in that case has our hearty concurrence, and it is believed to be supported by the later and better authorities. It is certainly founded on convenience, and is promotive of justice. Nor does the rule and practice here sanctioned at all conflict with the general and well-recognized doctrine that the plaintiff must aver in his declaration, and prove on the trial, performance, on his part of the agreement, or at least an offer to perform; otherwise he will not be entitled to recover, unless he is prepared to show there has been a waiver of such performance by the defendant. Such promissory conditions in the contract as he has undertaken to perform are known to the law as conditions precedent; and, if they have not been waived or dispensed with by the defendant, the plaintiff is bound at his peril to aver and prove them on the trial. This elementary rule of law applies as fully to actions on policies of insurance as to any other class of cases. So, in this case, the plaintiff was bound to aver and show in her declaration the making of the policy, its terms, the payment of the premium, the death of the assured, and the giving of notice and making proof thereof to the company. When these averments had all been proved, in so far as their proof had not been waived or dispensed with, a *prima facie* right of recovery was made out against defendant, which the latter was bound to meet by some affirmative action; otherwise the plaintiff was entitled to judgment.

It is contended, however, that, even upon this theory, the plaintiff was not entitled to recover, for the reason there was no competent testimony before the jury from which they were authorized to find that notice, and proofs of the death of the

assured were made out and given to the company within the time and in the manner required by the policy. This is conceded. Nevertheless, we do not think the defendant is in a position to take advantage of the deficiency of the proofs in this respect. It is an elementary principle of law that it is not necessary in any case to prove the performance of a condition which has been waived by the party having the right to demand its performance. A condition once waived is forever gone, and the performance of it cannot be thereafter required. We regard the doctrine well settled that, where notice and proofs of loss or of the death of the assured, in the case of a life policy, have been made out and delivered to the company in due time, and they are retained by it without objection, the company cannot, when subsequently sued on the policy, question their sufficiency: Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164; Great Western Ins. Co. v. Staaden, 26 Ill. 360; Herron v. Peoria M. & F. Ins. Co., 28 Ill. 235.

Moreover, it is well settled that, where an insurance company, after a loss has occurred, places its refusal to pay upon some ground not affecting the merits of the case, as, for instance, want of proper notice, all other formal objections not then complained of or pointed out will be regarded as waived. On the same principle, when the claim is that the policy, for any cause, never became legally binding upon the company, and it places its refusal to pay on that ground, it cannot be heard afterward to urge any mere formal objections to the right of recovery.

We think the facts in this case warranted the jury in finding proofs, and notice of the assured's death were delivered to the company in due time. The proofs were made out and handed to the company's agent at Chicago, to be sent by him to the home office at Hartford, Connecticut, on the thirty-first of January, 1884. The agent swears it was his custom, as a matter of convenience to the patrons of the company, to send proofs in that way; and it is but reasonable to presume he performed his duty in that respect, although he says he did not always do it, and could not say whether he did it in that case or not. At all events, in May following the general adjuster of losses was in Chicago, and at his request Mr. Smith, the attorney of the plaintiff, called on him in connection with this claim, and several interviews were had between them about it, resulting in an offer on the part of the company to return amount of premiums paid by the assured, but a refusal to pay anything on the policy. It is evident from these circumstances that the claim of the plaintiff had been referred by the company to its general adjuster of such claims, and this probably would not have been done if proofs of no kind of the assured's death had been received at the home office. Neither in these interviews nor at any other time does it appear any formal objections were interposed to the payment of the claim. The conduct of the company in offering to return the premiums, and making no formal objections to the proofs, or otherwise, we regard as equivalent to denying all liability on the policy. We also think the placing of its refusal on that ground was a waiver of all merely formal defenses, and, consequently, relieved the plaintiff from proving anything for the purpose of meeting merely formal objections, such as the making out and delivery of the proper proofs.

But this is not all. Assuming, as we do, there was sufficient evidence before the jury from which to find that some kind of proofs of the death of the assured, were in apt time delivered to the company, their failure to make any objection to them estopped them from afterward questioning their sufficiency. Consequently, the offering of them in evidence would have been a mere idle ceremony; for, however defective they may have been, no advantage could have been taken of it.

In addition to all this, we think, with the appellate court, that the filing of the declaration in this case was of itself implied notice to the defendant to produce the proofs in question on the trial, and, not having done so, the verbal testimony offered on the subject was, in our opinion, sufficient to warrant the finding of the jury. Nealley v. Greenough, 25 N. H. 325, and cases cited; 2 Phil. Ev. (Cow. & H. notes, 5th ed.) marg. p. 538, note 461.

It is hardly necessary to say, in conclusion, that the evidence before us has been discussed exclusively in its relation to the motion to withdraw the case from the jury, or to instruct the jury to find for the defendant, and not at all with the view of determining whether the facts were properly found by the jury or by the appellate court.

Judgment affirmed.

NOTE.—In an action on a policy of insurance, the plaintiff is not required to allege in his declaration, or complaint, mere waaranties of *existing* facts or conditions, and negative a breach of such warranties. To avail itself of the falsity or breach of such warranties as a defense, the insurance company must, by special plea, set up such falsity or breach, and must prove the truth of its plea. Such warranties are not conditions precedent, within the meaning of that term, as used in the law. A condition precedent calls for the performance of some act or the happening of some event *after* the execution of an agreement, before it shall become a binding contract. Such warranties lack an essential element of conditions precedent, in that they contain no stipulation that an event shall happen or an act be done *after* the agreement is reduced to form before it shall take effect as a contract.[1]

[1] Redman v. Ætna Ins. Co., 49 Wis. 431; Piedmont Ins. Co. v. Ewing, 92 U. S. 377; Grangers' Ins. Co. v. Brown, 57 Miss. 308; Swick v. Home L. Ins. Co., 2 Dill. 160, per Dillon, J.; Holabird v. Atlantic Ins. Co., *Id.* 166, per Treat, J.; N. W. Mut. L. Ins. Co. v. Hazlett (Ind.), 2 West. Rep. 690, 694; Boisblanc v. Life Ins. Co., 34 La. Ann. 1167; Simmons v. Ins. Co., 8 W. Va. 474; Jacobs v. Nat. L. Ins. Co., 1 McArthur, 632; Union Ins. Co. v. McGookey, 33 Ohio St. 555; Boos v. World M. L. Ins. Co., 6 T. & C. (N. Y.) 364;

Where the policy refers to an application of the assured, and declares it to be thereby made a part of the policy, and the statements therein made by the assured are warranted to be true, proof of the terms of such application and of the existence of the facts therein stated, or proof of the performance of conditions subsequent therein contained, is no part of the plaintiff's case, and his declaration or complaint need not set out such application. It will be sufficient if the plaintiff allege, in general terms, the truth of the statements contained in such application, and the performance of all conditions subsequent. The rules of pleading do not require the plaintiff in every action upon contract to aver and prove the whole contract. It is enough for each party to make out his own case. It is sufficient for the plaintiff to state those parts of the contract whereof a breach is complained; or, in other words, to show so much of the terms beneficial as constitutes the point for which he sues.[2]

Under the averment in his declaration or complaint, that he furnished to defendant due proofs of the death of assured, the plaintiff may show a waiver by the company of all defects in the proofs by retaining them in its possession without objection thereto within a reasonable time. The acts of the company from which the waiver springs, estops the company to deny that the proofs were sufficient and proper.[3]

Other cases hold that the effect of proof of waiver of proof of loss by the company is to strike out of the policy the condition requiring them.[4]

Chicago. J. H. M. BURGETT.

Grattan v. Nat. L. Ins. Co., 15 Hun, 75; Jones v. Brooklyn L. Ins. Co., 61 N. Y. 79; Murray v. N. Y. L. Ins. Co., 85 N. Y. 236, and the cases cited in the principal case, *supra*.

2 Redman v. Ætna Ins. Co., 49 Wis. 431; Simmons v. Ins. Co., 8 W. Va. 474; Continental L. Ins. Co. v. Kessler, 84 Ind. 310; Jacobs v. Nat. L. Ins. Co., 1 McArthur, 632; Throop v. N. Am. F. Ins. Co., 19 Mich. 423; Union Ins. Co. v. McGookey, 33 Ohio St. 555; Guardian M. L. Ins. Co. v. Hogan, 80 Ill. 35, 40; Mut. L. Ins. Co. Robertson, 59 Ill. 123, 126.

3 Butterworth v. Western Ass. Co., 132 Mass. 489, 492; German F. Ins. Co. v. Grunert, 112 Ill. 68.

4 Daul v. Ins. Co., 35 La. Ann. 98; Penn. F. Ins. Co. v. Dougherty, 102 Pa. St. 568; Ben Franklin Ins. Co. v. Flynn, 98 Pa. St. 627.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACCRETION—Dedication.——The rule is, in general, that accretions must be divided between adjoining proprietors, by extending their lines at right angles to the middle thread of the river, but that rule is not inflexible and must be modified by special circumstances. How far one who lays off lots and designates streets is to be held to dedicate parts of the land not specifically laid off into streets, is a question for the jury.—*City of Elgin v. Beckwith*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 558.

2. ACTION——Where brought — Disqualification of Judge.——A suit may properly be brought in a court when the judge thereof is disqualified to act, but it must be transferred to the proper court.—*Smith v. Harden*, S. C. Tex., March 8, 1887; 3 S. W. Rep. 453.

3. AGENCY—Del Credere—Insolvency.——An agent, under a *del credere*, has a lien for commissions and advances upon goods of his principal in his hands, and a transfer to him by his principal of those goods will, although irregular, be regarded as a foreclosure of the lien.—*Fourth Nat. Bank v. American Mills Co.*, U. S. C. C. (N. Y.), Jan. 19, 1887; 29 Fed. Rep. 611.

4. ANIMALS—Trespassing—Distraining—Notice.——An appraisement of the damages from trespassing stock is not valid, unless all the township trustees were notified to appear.—*Barrett v. Dolan*, S. C. Iowa, March 7, 1887; 32 N. W. Rep. 189.

5. APPEAL—Affirmance.—Where the findings cover the issues, are warranted by the evidence and support the judgment, and no error of law appears, the judgment will be affirmed.—*Cooper v. Kellogg*, S. C. Idaho, Feb. 28, 1887; 13 Pac. Rep. 350.

6. APPEAL — Amount in Controversy. —— In New York, an appeal will lie if the amount in controversy exceeds $500. A judgment for $400 principal and $156 interest is appealable.— *Graville v. New York, etc. Co.*, N. Y. Ct. App., Feb. 8, 1887; 10 N. E. Rep. 539.

7. APPEAL—Bonds—Code.——Under the California code, the bond to stay execution on appeal and the bond on appeal are not the same.—*Duffy v. Greenebaume*, S. C. Cal., March 17, 1887; 13 Pac. Rep. 323.

8. APPEAL—Copies of Record—Dismissal. —— The appellee, who wishes an appeal dismissed for failure of the appellant to supply him with copies of the record, must follow the proceedings prescribed by the rule of court. A failure to supply the judges with copies of the record will not cause a dismissal of the appeal, no penalty being provided for such failure.—*Mora v. Shick*, S. C. N. Mex., Feb. 4, 1887; 13 Pac. Rep. 341.

9. APPEAL—Dismissal—Injunction.——One of several appellants cannot dismiss an appeal against the will of his co-appellants, because a State court in another cause had enjoined them from making any claim against the appellee.—*Marsh v. Nichols*, U. S. S. C., March 14, 1887; 7 S. C. Rep. 704.

10. APPEAL—Findings — Reversal. —— Where the findings of fact are not responsive to the issues, and are too uncertain to warrant a judgment, the case should be reversed.—*Bowman v. Ayres*, S. C. Idaho, Feb. 21, 1887; 13 Pac. Rep. 346.

11. APPEAL—Judgment—Entry in Lower Court.—— Where, on appeal, it is decided a party is entitled to a fixed sum, the lower court, upon return of the case, should simply enter the judgment, and the fact that the judge was counsel in the case does not alter the proceeding.—*Howe v. Jones*, S. C. Iowa, March, 7, 1887; 32 N. W. Rep. 187.

12. APPEAL—Non-suit. —— No appeal lies from a judgment of non-suit.—*Lalande v. McDonald*, S. C. Idaho, Feb. 23, 1887; 13 Pac. Rep. 347.

13. APPEAL—Practice.——A defendant who did not, with his co-defendant, appeal to the supreme court of the State, nor to the Supreme Court of the United States, cannot, in the latter court, ask to be made a defendant and plaintiff in error.—*Marsh v. Nichols*, U. S. S. C., March 14, 1887; 7 S. C. Rep. 704.

14. APPEAL—Rejected Evidence.——A party objecting to the rejection of evidence, must show on appeal what that evidence was.—*Pennington v. McQueen*, S. C. Tex., Feb. 15, 1887; 3 S. W. Rep. 315.

15. APPEAL—Stay of Execution.——The filing of the undertaking required by law on an appeal, operates as a stay of execution.—*Cummings v. Cummings*, S. C. Cal., March 16, 1887; 13 Pac. Rep. 322.

16. ASSIGNMENT FOR CREDITORS—Title — Bond.—An assignment for the benefit of creditors divests the title of the assignor. The affidavit and bond by assignee are for the benefit of the creditors.—*Petry v. Randolph*, Ky. Ct. App., March 10, 1887; 3 S. W. Rep. 420.

17. ATTACHMENT—Chattel Mortgage—Possession by Mortgagee.——Where possession of the property is delivered to the mortgagee, his title is good against a subsequent attachment, though the mortgage was invalid, except as between the parties.—*Petring v. Heer Dry Goods Co.*, S. C. Mo., Feb. 14, 1887; 2. S. W. Rep. 405.

18. ATTACHMENT—Fraudulent Conveyance—Sureties—Partnership.——In an issue between an attaching creditor and an intervenor, when the attaching creditor abandons the suit, his sureties may prosecute it to a conclusion. A dormant partner is not a necessary party to a suit about partnership property.—*Boehm v. Calisch*, S. C. Tex., Feb. 4, 1887; 3 S. W. Rep. 293.

19. BILLS AND NOTES—Indorsers—Parol Contract. ——Blank indorsers of a promissory note cannot alter the liability of the maker, as fixed by the note, by a parol agreement between themselves and the maker.—*Latham v. Houston Flour Mills*, S. C. Tex., March 11, 1887; 3 S. W. Rep. 462.

20. CHARITIES—Bequest—Certainty.——A bequest, directing the executor to divide certain funds among such charitable institutions in a certain city as he shall deem worthy, is sufficiently definite, and will be carried into effect.—*Howe v. Wilson*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 390.

21. CHARTER—Party—Lien—Fraud. —— Where the owner of a chartered ship had lien for all freight and charges named therein, on any part of the cargo, goods shipped under a fraudulent bill of lading, given by the charterer, are liable for such freight and charges, although their owner had no notice of the charter party, the master having acted in good faith.—*The Karo v. Two Hundred Tons of Sulphur*, U. S. D. C. (Penn.), 1886; 29 Fed. Rep. 652.

22. CHATTEL MORTGAGE—Assent of Creditors—Attachment.——An attachment of personal property will prevail against a mortgage thereof made without knowledge of the mortgagees and delivered for record to the clerk.—*Wallis v. Taylor*, S. C. Tex., Feb. 25, 1887; 3 S. W. Rep. 321.

23. CHATTEL MORTGAGE—Conversion—Action by Mortgagee.——A mortgagee may maintain an action for conversion against the assignee for the benefit of the creditors of the mortgagor, who has taken the property and disposed of it, and it is only necessary to allege his special ownership, with its character and extent, and the conversion by the assignee.—*Case, etc. Co. v. Campbell*, S. C. Oreg., Feb. 1, 1887; 13 Pac. Rep. 324.

24. CHATTEL MORTGAGE — Conveyance of Property.——A bill of sale from the mortgagor and the mortgagee of personal property, conveys the title discharged of the mortgage.—*Bangs v. Friezen*, S. C. Minn., Feb. 11, 1887; 32 N. W. Rep. 173.

25. CHATTEL MORTGAGE — Possession of Mortgagor.——A chattel mortgage is void as to creditors and purchasers if the mortgagor remains in possession after the expiration of one year or after the expiration of ninety days from the maturity of the obligation without any measures taken to foreclose.—*Armstrong v. Broom*, S. C. Utah, Feb. 26, 1887; 13 Pac. Rep. 364.

26. CHATTEL MORTGAGE—Record—Lien.——Where A sells goods to B upon condition that, if B does not pay a certain sum of money, A can retake the goods and dispose of them as he pleases, the instrument must be recorded as a chattel mortgage to be a lien against the creditors of B.—*Key v. Brann*, S. C. Tex. Feb. 1, 1887; 3 S. W. Rep. 443.

27. COLLISION—Both in Fault—Measure of Damages.——If there is a collision between two steamers both in fault the owner of damaged cargo in one of them may sue both, for damages are to be assessed equally against both. The measure of damages is controlled by the net market value of the goods at their destination.—*Phœnix, etc. Co. v. The Sam Brown*, U. S. D. C. (Penn.), Jan. 6, 1887; 29 Fed. Rep. 650.

28. COLLISION—Notice.——A tug navigating about the mouth of a ferry slip is chargable with notice of the ferry boat's usual course in entering the slip.—*Conover v. The J. S. Darcy*, U. S. D. C. (N. Y.), Jan. 5, 1887; 29 Fed. Rep. 644.

29. COMMUNITY PROPERTY—Debts of Heirs—Decedent—Transactions.——Half of the community property on the death of the husband goes to his heirs and is subject to their debts, but a creditor cannot get possession till the death of the wife. In such a suit, the heir can testify that he knew the property was purchased with the wife's money.—*Harris v. Seinsheiner*, S. C. Tex., Feb. 11, 1887; 3 S. W. Rep. 307.

30. CONFLICT OF LAWS—Champerty—Collecting on Shares.——A contract to collect a demand on shares, made in a State in which such contract is illegal, and

carried into effect in a State in which it is legal, cannot be enforced in the latter State.—*Blackwell v. Webster*, U. S. D. C. (N. Y.), June 4, 1886; 29 Fed. Rep. 614.

31. CONSTITUTIONAL LAW — Abutters — Eminent Domain—Elevated Railroads—Damages.——An abutter upon public streets is entitled to damages sustained by a perversion of the street from its proper uses. An elevated railroad is such a perversion. Neither the legislature nor a municipal corporation can confer power upon a company to construct an elevated railroad without providing compensation to abutting owners for damages suffered thereby. Gas, dust, cinders, smoke steam, noise etc., are elements of such damages.—*Lohr v. Metropolitan, etc. Co.*, N. Y. Ct. App., Feb. 1, 1887; 10 N. E. Rep. 528.

32. CONTRACT—Fraudulent—Delivery of Goods.—— In a suit by a broker to recover the difference between the purchase price and the sale price of the goods, the broker can prove that he sold the goods to another at the defendant's order as a delivery, when the defense is, that there was no delivery.—*Morrison v. Day*, Ky. Ct. App., March 3, 1887; 3 S. W. Rep. 411.

33. CONTRACT—Time.——Time is of the essence of a contract to carry on the cloak business which provided that it might be terminated upon sixty days notice, and that if so terminated by one party the other might have the right to purchase the business within the sixty days.—*Carter v. Phillips*, S. J. C. Mass., Feb. 25, 1887; 10 N. E. Rep. 500.

34. CORPORATION —Forfeiture—Quo Warranto.—— The franchise of every corporation is subject to forfeiture for misuser or non-user, and the proper process is an information in the name of the State filed by the attorney-general.—*Darnell v. State*, S. C. Ark., Feb. 26, 1887; 3 S. W. Rep. 365.

35. CORPORATION—Jurisidiction.——If a corporation created by several States is sued in one of those States in a federal court, it is regarded, for jurisdictional purposes, as a citizen of that State. Such jurisdiction is not affected by the fact that the statute of the State of the defendant corporation's domicile forbids such suit to be brought on judgments, rendered in the courts of that State, without previous permission of that court. When collusion between plaintiff and defendant cannot be shown. An action will lie upon a judgment of another State pending an appeal or writ of error.—*Union Trust Co. v. Rochester, etc. Co.*, U. S. C. C. (Penn.), Dec. 6, 1886; 29 Fed. Rep. 609.

36. CORPORATION—Treasurer Improperly Loaning Funds—Ratification.——A corporation whose treasurer has improperly loaned its funds does not ratify his act by bringing suit against the borrower and accepting a percentage from him. The corporation has its remedy against the treasurer and his sureties for the balance unpaid by the debtor.—*Goodyear, etc. Co. v. Caduc*, S. J. C. Mass., Feb. 25, 1887; 10 N. E. Rep. 483.

37. COSTS.——The term "with costs," in the reversal of a judgment in a case in which the court has discretion in the matter, means the costs of the appeal only. —*In re Water Commrs., etc.*, N. Y. Ct. App., Feb. 11, 1887; 10 N. E. Rep. 545.

38. COSTS—Who Liable—Guardian and Ward.—— Under Texas law, if a reasonable fee for the guardian *ad litem* for a minor cannot be collected from the ward, the plaintiff is liable therefor as costs.—*Ashe v. Youngst*, S. C. Tex., March 8, 1887; 3 S. W. Rep. 454.

39. COUNTIES—Division of — Debt. —— Upon the creation or a new county out of a part of an old one, in the absence of any legislative provision the old county takes all the property and is liable for all the debt and other burdens.—*Gilliam Co. v. Wasco Co.*, S. C. Oreg., Feb. 19, 1887; 13 Pac. Rep. 824.

40. CRIMINAL LAW — Affidavit—Continuance.——It is not error to overrule an application for a continuance, when the prosecution consents to have the affidavit, so far as it was competent, read at the trial as the testimony of the absent witness.—*King v. Com.*, Ky. Ct. App., March 17, 1887; 3 S. W. Rep. 430.

41. CRIMINAL LAW—Appeal.——The supreme court of New York should reverse convictions in criminal cases only on the ground that the verdict is against the weight of the evidence, and not for errors of law alone. —*People v. Stevens*, N. Y. Ct. App., Feb. 1, 1887; 10 N. E. Rep. 527.

42. CRIMINAL LAW — Appeal — Escape.——When a prisoner, pending his appeal from a conviction, escapes, his appeal will be dismised.—*Territory v. Trinkhouse*, S. C. N. Mex., Feb. 4, 1887; 13 Pac. Rep. 341.

43. CRIMINAL LAW—Assault with Intent to Kill—Shooting Another.——If a party feloniously shoots at one person with intent to kill, and misses him and shoots another, he is guilty of an assault with intent to kill.—*State v. Montgomery*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 379.

44. CRIMINAL LAW — Autrefois Acquit —Partners. ——A former acquittal of a co-defendant is not a bar to a subsequent prosecution of the defendant, though they were partners.—*Goforth v. State*, Tex. Ct. App., Nov. 24, 1886; 3 S. W. Rep. 332.

45. CRIMINAL LAW — Brass Knuckles. —— Brass knuckles is a designation applied to certain weapons; it is immaterial of what substance they are made.— *Harris v. State*, Tex. Ct. App., Jan. 22, 1887; 3 S. W. Rep. 477.

46. CRIMINAL LAW—Confession.——The confession of one of two persons jointly indicted slightly implicating the other, being admitted in evidence without objection, the court charged the jury that a confession not made in open court would not warrant a conviction, unless supported by other proof that the offense had been committed. Such instruction did not prejudice the prisoner.—*State v. Kieger*, S. C. Iowa, March 4, 1887; 32 N. W. Rep. 13.

47. CRIMINAL LAW — Disorderly House—Common Reputation.——That a house is a disorderly house may be established by common reputation, but to convict the proof must directly implicate the person charged. —*Sara v. State*, Tex. Ct. App., Jan. 8, 1887; 3 S. W. Rep. 339.

48. CRIMINAL LAW—Disturbing the Peace—Private House.——In a prosecution for disturbing the peace in a private house, the character of the house is not changed because a large number of guests were present.—*Terry v. State*, Tex. Ct. App., Jan. 22, 1887; 3 S. W. Rep. 477.

49. CRIMINAL LAW—Evidence—Motive—Indictment —Third Parties.——Indictment against defendant for offenses different from the one on trial are admissible, when they tend to show a motive on his part to commit the offense for which he is on trial. Investigation as to other parties is inadmissable, unless the inculpatory facts are proximately connected with the transaction.—*Kunde v. State*, Tex. Ct. App., Oct. 27, 1886; 3 S. W. Rep. 325.

50. CRIMINAL LAW — Failure to Summon Juror—

Challenge—Exception.——The intentional failure of the sheriff to summon a juror duly drawn is a ground of challenge to the panel, and an exception to the challenge admits the facts stated therein.—*People v. Armstrong*, S. C. Idaho, Feb. 21, 1887; 13 Pac. Rep. 342.

51. CRIMINAL LAW—False Packing.——The false packing of a bale of cotton to deceive the purchaser is denounced by the penal code; it is immaterial when the false substance is put in.—*Jones v. State*, Tex. Ct. App., Jan. 22, 1887; 3 S. W. Rep. 478.

52. CRIMINAL LAW—Former Jeopardy — Larceny—Different Owners.——An acquittal of the charge of burglariously entering a house and committing a larceny of A's clothes is no bar to a trial for larceny of B's clothes in the same room, the two sets of clothes being in opposite parts of the room.—*Phillps v. State* S. C. Tenn., March 8, 1887; 3 S. W. Rep. 434.

53. CRIMINAL LAW — General Verdict — Different Counts.——Where the indictment charges two different offenses, punishable with different penalties in two counts, growing out of the same transaction, the jury may bring in a general verdict, the effect of which is to convict of the higher offense.—*Davis v. State*, S. C. Tenn., March 7, 1887; 3 S. W. Rep. 348.

54. CRIMINAL LAW—Information — Time.——An information must charge the offense to have been committed before its filing, or it is void.—*Kennedy v. State*, Tex. Ct. App., Jan. 26, 1887; 3 S. W. Rep. 480.

55. CRIMINAL LAW—Larceny—Parol Proof of Brand.——In a trial for larceny of a horse, parol proof of the record of the brand is inadmissible.—*Elsner v. State*, Tex. Ct. App., Jan. 22, 1887; 3 S. W. Rep. 474.

56. CRIMINAL LAW—Larceny—Variance.——Where the proof in a case of larceny shows the ownership in one and the possession in another, when the indictment charged ownership and possession in the same person, it is a fatal variance—*Hall v. State*, Tex. Ct. App., Jan. 8, 1887; 3 S. W. Rep. 338.

57. CRIMINAL LAW—Murder — Evidence — Duress.——Testimony of a party taken before a magistrate or coroner's inquest, who was then aware that he was charged with, or suspected of, the crime, is inadmissible against him on his trial therefor.—*Wood v. State*, Tex. Ct. App., Dec. 17, 1886; 3 S. W. Rep. 336.

58. CRIMINAL LAW — Privileged Communications.——Communications made to an attorney before the commission of a crime, and for the purpose of being guided or helped therein, are not privileged.—*Orman v. State*, Tex. Ct. App., Dec. 17, 1887; 3 S. W. Rep. 468.

59. CRIMINAL LAW—Prosecuting Attorney — Extortion—Indictment.——An indictment of a prosecuting attorney for receiving a fee for dismissing a case must charge he received a fee, either in excess of that allowed or when he was entitled to none under the two statutory provisions.—*Poole v. State*, Tex. Ct. App., Jan. 22, 1887; 3 S. W. Rep. 476.

60. CRIMINAL LAW—Rape— Fraud — Married Women.——The carnal intercourse obtained with a woman by means of fraud, which is defined as rape, must be obtained by some stratagem by which she is induced to believe the party is her husband, and an attempt to have carnal intercourse with a woman while she was asleep, does not come under the law.—*King v. State*, Tex. Ct. App., Jan. 12, 1887; 3 S. W. Rep. 342.

61. CRIMINAL LAW—Rape—Indictment.——If an indictment alleges that a rape was accomplished by force, threats, or fraud, or all together, it need not specify the character of the force, or state the threats used.—*Cooper v. State*, Tex. Ct. App., Nov. 27, 1886; 3 S. W. Rep. 334.

62. CRIMINAL LAW — Separation of Jury —Newly-Discovered Evidence.——Where a part of the jury in a murder trial remain in the dining-room of a hotel, and a part go out of their sight with the sheriff into the saloon thereof, during the progress of the trial, and after they are put in charge of the sheriff, is a ground for a reversal. An affidavit of a grand juror, that a witness, whose testimony is very important in a case of circumstantial evidence, made a different statement before the grand jury, is newly-discovered evidence, and a ground for a new trial.—*State v. Murray*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 397.

63. CRIMINAL LAW—Statement of Facts—Reversal.——The case will be reversed, when the trial judge fails to sign the statement of facts agreed upon by both parties, and also fails to sign a statement prepared by himself.—*Sara v. State*, Tex. Ct. App., Jan. 8, 1887; 3 S. W. Rep. 339.

64. CRIMINAL LAW—Void Indictment—Bail.——All proceedings based on a void indictment are void.—*Harrell v. State*, Tex. Ct. App., Jan. 26, 1887; 3 S. W. Rep. 479.

65. CRIMINAL PRACTICE — Dismissal — Evidence—Examination of Defendant's Person.——A charge of assault to kill, joined with one for burglary in the same indictment, may be dismissed after the trial has been begun. Evidence tending to show that some of the parties charged were seen near the place where the booty was hidden is admissible against another of the parties charged. An examination of the prisoner's person in jail is not necessarily compulsory because the sheriff was present.—*State v. Struble*, S. C. Iowa, March 3, 1887; 32 N. W. Rep. 1.

66. CUSTOMS — Sufficiency — Final Judgment.——Factors cannot, because of commercial depression, adopt a custom extending their authority over property confided to their care without the knowledge of the shipper. A custom, proved by one witness and contradicted by others, is not established. In Texas, there can be no final judgment till such judgment has been rendered against all the defendants.—*Wooters v. Kauffman*, S. C. Tex. March 11, 1887; 3 S. W. Rep. 465.

67. DAMAGES—Measure of — Opinion.——In an action for damages for breach of contract not to engage in the business, evidence of the value of the hotel with the contract in force and with it broken is not admissible.—*Larkins v. Chamberlin*, S. C. Utah, Feb. 2, 1887; 13 Pac. Rep. 361.

68. DEBTOR AND CREDITOR—Widow— Community —Property.——A widow continued her husband's business and bought additional goods. The new goods were held liable for the payment of new debts, unless it appeared that they had been acquired with the old stock. The old goods were not liable for the new debts because they were community property.—*Cleveland v. Harding*, S. C. Tex., Feb. 15, 1887; 3 S. W. Rep. 537.

69. DEED— Absolute — Mortgage.——An absolute deed should be construed with another executed at the same time by the grantee agreeing on certain terms to reconvey, and should be considered to be a mortgage.—

Frey v. Campbell, Ky. Ct. App., Feb. 24, 1887; 3 S. W. Rep. 368.

70. DEEDS—Alteration—Bond — Escrow.——Where a bond is materially altered and this is ordinarily observable, it is void as to the obligors who have no knowledge of it, or do not consent to it, or do not ratify it as altered. If a bond is delivered conditionally, the obligee is bound thereby, if it is suggested by anything appearing on the face thereof or is brought to his knowledge before acceptance thereof.—*State v. Churchill*, S. C. Ark., Feb. 5, 1887; 3 S. W. Rep. 352.

71. DEED—Quitclaim — Bona Fide Purchaser.—— One who takes a quitclaim deed is not a *bona fide* purchaser without notice and is put upon inquiry, but if the grantor in the deed also grants, bargains and sells, the purchaser may elect to hold under those provisions as a *bona fide* purchaser without notice.—*Richardson v. Levy*, S. C. Tex., Feb. 11, 1887; 3 S. W. Rep. 444.

72. DIVORCE—Notice by Publication—Affidavit.—— In an affidavit for publication it is not necessary to set forth the causes for which the divorce is sought.—*Shedenhelm v. Shedenhelm*, S. C. Neb., March 9, 1887; 32 N. W. Rep. 170.

73. EASEMENT—Ways.——The rule as to easements is that he who owns the land subject to an easement can use it for any purpose or in any manner not inconsistent with the due enjoyment of the easement. Hence, bay-windows may be constructed by the owner of an alley-way five feet wide, provided they do not conflict with the use of the alley-way as a pass-way by parties entitled to an easement therein.—*Burnham v. Nevins*, S. J. C. Mass., Feb. 25, 1887; 10 N. E. Rep. 494.

74. EMINENT DOMAIN — Railroads — Damages — Ejectment.——The statutory remedy for damages for land taken for a railroad is exclusive of all others, but unless the land is legally condemned, the owner can bring ejectment, as against any other trespasser.—*Hull v. Ch. etc. Co.*, S. C. Neb., March 9, 1887; 32 N. W. Rep. 162.

75. EQUITY— Fraud—Undue Influence.——A deed by a mother-in-law to her son-in-law, obtained by misrepresentations when he had managed her business and had relied upon him, was set aside as obtained by fraud and undue influence.—*McHarry v. Irwin*, Ky. Ct. App., March 8, 1887; 3 S. W. Rep. 374.

76. EQUITY—Jurisdiction—Accounts—Jury.——The difficulty of adjusting accounts is, of itself, a ground of equity jurisdiction, and where a cause is properly before a court of equity, the submission of facts to a jury is discretionary.—*State v. Churchill*, S. C. Ark., Feb. 5, 1887; 3 S. W. Rep. 352.

77. EQUITY—Married Woman's Deed—Reformation. —In the absence of a proper statute, a court of equity cannot correct a mistake in a married woman's deed. —*Montana Nat. Bank v. Schmidt*, S. C. Mont., Feb. 2, 1887; 13 Pac. Rep. 382.

78. EQUITY—Notice — Subrogation.—— Equity will postpone him who is prior in time in obtaining a lien, to him who has been allowed to act in ignorance of an opposing title, which it was the duty of the holder of that title to communicate.—*Coleman v. Dunman*, S. C. Tex., Feb. 15, 1887; 3 S. W. Rep. 319.

79. EQUITY—Practice—Master.——If a master bases his conclusions upon sound and definite testimony, his report should be sustained, although much of the evidence before him was of the opposite character.—*Perry's Appeal*, S. C. Penn., March 7, 1887; 8 Atl. Rep. 450.

80. ESTATES—Assessment—Life Tenant — Remainderman—Infant.——A life tenant is bound to pay assessments for granite pavement in front of the property. No part of such charge can be made on the remainderman, he being an infant eight years old.—*Reyburn v. Wallace*, S. C. Mo., Feb. 28, 1887; 3 S. W. Rep. 482.

81. ESTOPPEL—Absolute Deed—Mortgage.—— One who mortgages his land, and afterwards makes an absolute deed conveying it, with a parol agreement with the grantee that he should sell the land and apply its proceeds to the grantor's debts and pay the balance to him, the grantor, and that the land should not be sold without his consent, is estopped by the fact that, in conferring with a person proposing to purchase, about the price, he failed to inform such person that the land was held in trust, and could not be sold without his consent.—*Gill v. Hardin*, S. C. Ark., March 5, 1887; 3 S. W. Rep. 519.

82. EVIDENCE—Hearsay—Res Gestæ.—— A physician, who examined plaintiff's injuries, may give his opinion as to the cause and probable consequences of them, and may state the complaint made to him by the plaintiff; but the plaintiff cannot testify what the physician said about his wounds.—*Armstrong v. Town of Ackley*, S. C. Iowa, March 5, 1887; 32 N. W. Rep. 180.

83. EXECUTION—Levy—Re-levy—Junior Liens.—— In Indiana, a levy on land may be abandoned and a new levy made on other lands, but, being irregular, it will be set aside if equity requires it. If land is sold under an execution, on which proper credits have not been given, a purchaser without notice will not be affected by the irregularity. If an execution has a lien on several tracts of land, and is levied on one of them, subject to a junior lien, the holder of the latter may require the holder of the senior lien to account to him for the amount of his interest. An agreement for extension, not authorized by all the partners sureties, the agreement being signed by one only, is not binding on the creditor.—*Mulmine v. Bass*, U. S. C. C. (Ind.), December Term, 1886; 29 Fed. Rep. 632.

84. EXECUTION—Nunc pro Tunc Entry — Injunction.——Wheee a judgment on a *supersedeas* bond on an appeal from a justice is rendered against all parties, but by mistake entered only against the principal, and at the next term, by a *nunc pro tunc* entry, is entered also against the sureties, ordinarily an injunction will not lie to enjoin an execution against the sureties.—*Shaul v. Duprey*, S. C. Ark., Feb. 26, 1887; 3 S. W. Rep. 366.

85. EXECUTION—Sale—Reversal—Damages—Parties Liable.——Where property has been sold on execution, and has gone into the hands of a purchaser for value, and the judgment is reversed, the measure of damages is the value of the property on the day of sale, with interest on the proceeds, and rents that accrued on the realty in the receiver's hands to the day of sale, and the ordinary costs expended in the action by the owner, not including his attorneys' fees; and the parties who sought and obtained the erroneous judgment are liable.—*Hays v. Griffith*, Ky. Ct. App., March 17, 1887; 3 S. W. Rep. 431.

86. EXECUTION—Sale—Reversal of Judgment.—— The reversal of a judgment does not affect a sale under it, though the plaintiff was the purchaser, and has not yet received his deed, if the sale was confirmed and no appeal taken from the order of confirmation.—

Dunn v. German Sav. Bank, Ky. Ct. App., March 12, 1887; 3 S. W. Rep. 425.

87. EXECUTION — Stayor — Surety. —— A surety against whom judgment is rendered with his principal, cannot demand that the execution be first levied against a stayor, who became such at the request of the principal.—*Stafford v. Montgomery*, S. C. Tenn., Jan. 11, 1887; 3 S. W. Rep. 438.

88. EXECUTOR—Bond—Will — Exempting. —— On appeal from an order requiring an executor to give bond, where the will exempted him from so doing, the order should not be reversed, unless it appears that the court acted capriciously.—*Grigsby v. Cocke*, Ky. Ct. App., March 8, 1887; 3 S. W. Rep. 418.

89. EXECUTOR—Partial Payment—Interest—Waiver. ——A partial payment of a claim by an executor, before verification thereof, is not a waiver of the right to refuse to pay the interest accruing after the death of the debtor, unless the claim is verified and demanded within a year after the qualification of the executor.—*Jett v. Cockrill*, Ky. Ct. App., March 10, 1887; 3 S. W. Rep. 422.

90. EXECUTOR—Sale of Land.——Where an administrator, with the will annexed, who is also a residuary legatee, sells land of the estate without an order of court therefor, but with the concurrence of the other residuary legatee, he and his sureties are responsible for the proper application of the proceeds of such sale.—*Lewis v. Carson*, S. C. Mo., Feb. 28, 1887; 3 S. W. Rep. 483.

91. EXECUTOR—Suits on Notes—Foreign Administrator—Domicile.——A foreign administrator, not appointed at the domicile of the deceased, cannot sue on a note belonging to the estate, in Kansas.—*Moore v. Jordan*, S. C. Kan., March 2, 1887; 13 Pac. Rep. 337.

92. FALSE PRETENSES—Indictment.—— An indictment which charged that the defendant obtained goods by reason of certain statements made by him to the prosecutor, that a *named* person had told him to go to the prosecutor's store and get the goods specified, all of which statements were false, constitutes a charge sufficiently definite to enable the accused to know what was laid to his charge.—*Commonwealth v. Whitney*, Ky. Ct. App., March 10, 1887; 3 S. W. Rep. 533.

93. FORCIBLE ENTRY AND DETAINER—Jurisdiction —Landlord and Tenant.——In Texas, the right to proceed by forcible entry and detainer in a justice's court is cumulative, and does not supersede the right to sue in the district court. A tenant cannot disclaim his relation to his landlord, and claim to hold under another before he has surrendered possession to his landlord. It is not sufficient to change his tenure that he has abandoned the property for a time and reentered under a new claim of title.—*Juneman v. Franklin*, S. C. Tex., Feb. 18, 1887; 3 S. W. Rep. 562.

94. FORCIBLE ENTY AND DETAINER—Vendor and Vendee.—Where A puts B in possession of his land, under an agreement of purchase, and, in case of failure so to do, to pay rent, C, who buys the land under a prior mortgage thereof from A to him, succeeds to A's rights as landlord, on B's failure to purchase, and can maintain an action for unlawful detainer against B.—*Ish v. McRae*, S. C. Ark., March 5, 1887: 3 S. W. Rep. 440.

95. GARNISHMENT—Constructive Possession.—— A garnishee cannot be held liable for property of which he has only constructive possession, and cannot obtain upon demand the actual possession.—*Smalley v. Miller*, S. C. Iowa, March 8, 1887; 32 N. W. Rep. 187.

96. GIFT — Undue Influence. —— The question whether a note was given by the owner as compensation for board, or as a gift made under undue influence, is properly submitted to a jury.—*Osthaus v. McAndrew*, S. C. Penn., March 7, 1887; 8 Atl. Rep. 436.

97. HIGHWAYS — Location — Committee.——A committee appointed by the Supreme Judicial Court of Maine to revise the proceedings of county commissioners, in the matter of the location of a highway, can pass only upon questions of convenience and necessity, and cannot reverse on the ground of illegal procedure.—*Bryant v. County Commissioners*, S. J. C. Me., Feb. 18, 1887; 8 Atl. Rep. 460.

98. HOMESTEAD — Abandonment — Statute. —— A widow who, for one year after the death of her husband, kept but one room in the house, in which she stored furniture, and afterwards sold the furniture and rented the room, and who said her intentions were not definite as to when she would go to housekeeping: *Held*, that she had abandoned the homestead. Illinois homestead act, § 2. — *Farnau v. Borders*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 550.

99. HOMESTEAD—Reassignment.——In Missouri, if the homestead assigned to a debtor has increased in value, so that it is worth more than the value prescribed by law, it may be reassigned, and the surplus devoted to the payment of his debts.—*Beckner v. Rule*, S. C. Mo., Feb. 28, 1887; 3 S. W. Rep. 490.

100. HUSBAND AND WIFE—Joint Property—Subrogation.——A husband who owned land jointly with his wife, sold the whole property, representing that he had authority to do so. The purchaser, having bought in good faith and having paid off an incumbrance, was held entitled to be subrogated to the rights of the incumbrancer as to the wife's share of the land, but she could recover from him her share of the land and rents and profits.—*Dillon v. Warfel*, S. C. Iowa, March 7, 1887; 32 N. W. Rep. 194.

101. HUSBAND AND WIFE—Separate Estate—Lien—Acknowledgment.——In Tennessee, a married woman may charge her separate estate by a note for necessaries previously furnished, the note stating that she charges her separate estate for the payment of the note. Such a charge is not a lien on her land and does not limit her power of alienation. To render such a charge valid no privy examination is necessary. —*Warren v. Freeman*, S. C. Tenn., March 6, 1887; 3 S. W. Rep. 513.

102. HUSBAND AND WIFE — Separate Estate — Promissory Note—Evidence, Parol.——In Tennessee, a married woman holding a separate estate cannot charge it for the payment of money by a promissory note in the usual form without any reference in it to her separate estate, and parol evidence is not admissible to show that the note was intended as a charge. Equity will not cause a judgment at law to be satisfied out of the separate estate of a *feme covert*, unless she has charged it by a valid promise or enjoinment. —*Jordon v. Keeble*, S. C. Tenn., Feb. 10, 1887; 3 S. W. Rep. 511.

103. INDIANS—Right to Fisheries—Injunction. —— A treaty with Indians conferring on them the right to take fish, the privilege is reserved to them to enjoy the fisheries they had hitherto enjoyed, and a fence erected by a homesteader under a subsequent law,

obstructing their approach to the fishery, will be removed by order of a court of equity.—*United States v. Taylor*, S. C. Wash. Terr., Jan. 25, 1887; 13 Pac. Rep. 333.

104. INDICTMENT—Time — Perjury.——An indictment should state some particular day on which the offense was committed, although it is not necessary to prove that the offense was committed on that day, except when time is of the essence of the charge. An indictment for perjury is not sufficiently particular which charges that the offense was committed at a certain term of a named court.—*State v. Fulason*, S. J. C. Me., Feb. 17, 1887; 8 Atl. Rep. 459.

105. INFANT—Avoiding Deed — Restoring Money. ——An infant may avoid his deed without restoring the purchase money, when the money was paid, not to the infant, but to his agent.—*Vogelsang v. Null*, S. C. Tex., March 4, 1887; 3 S. W. Rep. 451.

106. INJUNCTION—Execution—Lapse of a Year.—— An injunction will be issued against an execution issued after the expiration of a year, but will be dissolved on proof that the judgment has not been paid. —*Seymour v. Hill*, S. C. Tex., Feb. 15, 1887; 3 S. W. Rep. 313.

107. INJUNCTION — Remedy at Law—Void Judgment—Damages.——A complaint asking to enjoin an execution on a judgment must show there is no remedy at law. No damages should be awarded on dissolving an injunction against a void judgment.—*Wingfield v. McLure*, S. C. Ark., Feb. 26, 1887; 3 S. W. Rep. 439.

108. INNKEEPER—When a guest.——If a person stops at an inn as a traveler and is so received, the relation of innkeeper and guest is established, and the relation is not necessarily changed by agreement as to price or length of sojourn.—*Ross v. Mellin*, S. C. Minn., Feb. 11, 1887; 32 N. W. Rep. 172.

109. INSOLVENCY— Poor Debtor — Waiver.——A magistrate being about to resign told the attorney of a creditor that he would withhold his resignation until he had administered the proper insolvent oath to the debtor in question. The attorney assured him that he need not refrain from resigning and that the case would be dropped, and thereupon the magistrate resigned. By his assurance to the justice, the attorney waived his client's right to hold the debtor on his recognizance.—*Venal v. Tuttle*, S. J. C. Mass., Feb. 24, 1887; 10 N. E. Rep. 489.

110. INSURANCE—Fire Agent.——A conveyance by husband and wife of the insured premises to a third person, who immediately conveyed it to the insured, is not a sale that will avoid a policy. An agent whose only authority is to receive premiums and issue policies, cannot orally waive conditions which the policy requires to be waived only by the printed or written consent of the company.—*Kyte v. Commercial, etc. Co.*, S. J. C. Mass., Feb. 24, 1887; 10 N. E. Rep. 518.

111. INSURANCE, FIRE — Forfeiture, Waiver of— Renewal by Parol.——A demand and payment of overdue premium is a waiver of a forfeiture of a policy of fire insurance, unless the policy stipulates otherwise; but a demand for the premium and a threat to sue therefor is not a waiver of a forfeiture. A policy may be renewed by parol by an authorized agent, though the policy stipulates otherwise.—*Cohen v. Continental, etc. Co.*, S. C. Tex., Feb. 4, 1887; 3 S. W. Rep. 296.

112. INSURANCE, FIRE—Mutual— Cash Payments. ——A mutual fire insurance company can, under Missouri laws, issue policies for all cash premiums running less than six years; and the only policies required to be for six years are those for which notes are given at their organization without a guaranty fund.—*State v. Manfg., etc. Co.*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 383.

113. INSURANCE—Fire—Other Company.——A provision that insured shall not insure in other companies without consent, etc., will not operate as a forfeiture if the plaintiff insures other property in another company although there may be some mingling of the goods.—*Boatman's, etc. Co. v. Hocking*, S. C. Penn., Feb. 21, 1887; 8 Atl. Rep. 417.

114. INSURANCE, FIRE—Powder in Stock—Representations of Agent.——The insured cannot recover on a policy if he kept powder on the premises contrary to the express provisions of the policy, though the insurance agent stated that he might do so under the policy. False statements made in the application for the policy do not affect the insured, if the insurance agent wrote the application and they do not conform to the statements made by the insured.—*Western Ass. Co. v. Rector*, Ky. Ct. App., March 5, 1887; 3 S. W. Rep. 415.

115. INSURANCE—Marine Policy— Collision — Damages.——A policy which provides that it shall cover losses by collision, includes damages which the vessel had to pay for a collision in which the fault was that of its own officers.—*Whorp v. Equitable, etc. Co.*, S. J. C. Mass., Feb. 25, 1887; 10 N. E. Rep. 513.

116. INTOXICATING LIQUORS—Druggists — Statutes —Witness.——In Tennessee, a druggists can, without taking out the regular retailer's licenee, sell liquor only for communion purposes and upon the prescription of a physician. If he otherwise sells liquor, he subjects himself to a suit for the tax by the State, and to an indictment for each sale. Tennessee statutes construed. A witness cannot refuse to testify because he will criminate himself if the offense with which he would hereby charge himself is barred by the statute of limitations. The witness must in any case claim the exemption when he is examined; if only a general objection is made and the witness answers, his answer cannot be suppressed.—*State v. Wharton*, S. C. Tenn., Feb. 21, 1887; 3 S. W. Rep. 490.

117. INTOXICATING LIQUORS—License—Three Bars in House.——A license to sell intoxicating liquors at one place, the main entrance to a hotel, covers three bars, screened off by partitions and connected by doors and accessible to all the guests.—*City of St. Louis v. Gerardi*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 408.

118. INTOXICATING LIQUORS—Notice — Statute.—— Under the statute of Massachusetts, Pub. Stat. ch. 100, § 25, it is a sufficient notice to a liquor seller for a wife to write to him: "I hereby warn you not to harbor my husband, or to sell him any more liquor or beer * * * * or I will put you to trouble.—*Tate v. Donovan*, S. J. C. Mass., Feb. 24, 1887; 10 N. E. Rep. 492.

119. JUDGMENTS—Res Adjudicata—Separate Trials. ——Where separate trials are granted to different defendants, one of them cannot claim that the result of the trial against another makes the issues *res adjudicata* as to him.—*Eikenberg v. Edwards*, S. C. Iowa, March 5, 1887; 32 N. W. Rep. 183.

120. JURISDICTION — Municipal Corporations—Police Power.——The pendency in the United States cir-

cuit court of an action involving the validity of a municipal ordinance, does not preclude a State court from taking cognizance of an action involving the validity of another later ordinance of the same body on the same subject. A city has the right under its police powers to limit the slaughtering of animals for food to certain districts.—*Vilavaso v. Barthel*, S. C. La., March 7, 1887; 1 South. Rep. 599.

121. JURISDICTION —Municipal Coporation—Taxation.——Tax-payers may contest municipal ordinances increasing taxation. District courts have jurisdiction of such cases subject to appeal to the supreme court if the value in controversy exceeds $2,000.—*Handy v. City of New Orleans*, S. C. La., Feb. 7, 1887; 1 South. Rep. 593.

122. JURISDICTION—State Officer —Sheriff—Constitution.——Under the State constitution, a State officer is one whose jurisdiction is co-extensive with the State, and in suits against them the supreme court has jurisdiction. In that sense a sheriff is not a State officer.—*State v. Spencer*, S. C. Mo., Feb. 28, 1887; 3 S. W. Rep. 410.

123. JURY—Homicide—Evidence—Confession—Self-Defense.——One who was a member of the grand jury that found the indictment may be challenged for that cause. When deceased was killed by a cut with a knife, it is competent to prove that the accused borrowed a knife in view of the impending affray. It is competent to prove a confession by the accused of a previous difficulty with the deceased, and a co-defendant cannot object to the evidence as likely to injure him. It is error to instruct the jury that, if deceased advanced upon accused with a drawn knife, he was not bound to retreat but might stand his ground. The jury must decide whether statements made by a defendant when sober are more probably true than those made when he was drunk.—*Finch v. State*, S. C. Ala., Jan. 24, 1887; 1 South. Rep. 564.

124. JUSTICE'S COURT — Record — Appeal.——The cause of action in a justice's court must appear from his record, or the pleading or from an agreed case, otherwise the supreme court cannot receive the action of the district court.—*Maass v. Solinsky*, S. C. Tex., Feb. 1, 1887; 3 S. W. Rep. 289.

125. JUSTICES—Pleadings.——Pleadings are essential in cases before justices of the peace, though they may only be brief statements noted on the docket.—*Moore v. Jordan*, S. C. Tex., Feb. 15, 1887; 3 S. W. Rep. 317.

126. LANDDORD AND TENANT—Lessee.——The lessee of a farm is entitled to the crop of wheat growing upon it at the time the lease is executed and maturing during the term.—*Emery v. Fugina*, S. C. Wis., March 22, 1887; 32 N. W. Rep. 236.

127. LANDS—School—Forfeiture—Second Purchaser —Cutting Timber — Damages. —— A party having a patent for school lands can maintain an action for timber cut therefrom against all the parties jointly engaged in so doing, and his damages will be the highest market value thereof, though such parties were authorized so to do by the party then holding the certificate for the land, whose interest therein was subsequently forfeited.—*Smith v. Morgan*, S. C. Wis., March 1, 1887; 32 N. W. Rep. 135.

128. LANDS—School—Purchaser—Payment of Interest—Presumption.——Where a purchaser is required to pay the interest due on school lands, but he fails to do so for years, and they are forfeited and resold, it will be presumed the proper officers gave him the proper notice of his default that they are required by law to do.—*State v. Graham*, S. C. Neb., March 1, 1887; 32 N. W. Rep. 142.

129. LIMITATIONS—Statute.——The statute of limitations will run in favor of a defendant who, at the time when the cause of action accrued, had changed his residence and was living in Iowa under an assumed name. Neither these facts nor the fact that plaintiff had made diligent but unsuccessful efforts to find the defendant will deprive the latter of the benefit of the statute of limitations.—*Miller v. Lesser*, S. C. Iowa, March 8, 1887; 32 N. W. 250.

130. LIMITATIONS—Statute of—Condemning Land—Part Owner.——In a suit by a part owner for a part of the money received for land condemned, plaintiff may rely upon the statute of limitations, though he innocently misrepresented to plaintiff their true division line, so that plaintiff thought his land was not affected.—*McFaddin v, Prater*, S. C. Tex., Feb. 1, 1887; 3 S. W. Rep. 306.

131. LIMITATIONS — Will — Contract.——Where a husband agrees with his son to dismiss his suit to set aside his wife's will upon a certain division of the provision between them and the daughter, after an acquiescence for twenty years by the father and daughter, neither one of them could sue to set aside the agreement.—*Riggs v. Riggs*, Ky. Ct. App., March 17, 1887; 3 S. W. Rep. 423.

132. LIS PENDENS— Dismissal of Suit—Attorney—Re-instatement.——A purchaser of premises, after the dismissal of a suit in ejectment in ignorance of the filing of a motion in vacation to re-instate it, takes the property free of the lien of the suit. An attorney has an implied power to dismiss a suit.—*Davis v. Hall*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 382.

133. MANDAMUS—Officers of a City — Judgment — Attorney's Lien.——Where a judgment has been obtained against a city, and been assigned and satisfied, *mandamus* will not lie against the officers of the city to the lien of the attorney thereon, which had been filed, when no proceedings have been had to determine the lien or to set the assignment or satisfaction aside —*Chambers v. Territory*, S. C. Wash. Terr., Jan. 26. 1887; 13 Pac. Rep. 336.

134. MANDAMUS—School Voucher—Record.——In a *mandamus* proceeding to compel the commissioners' court to issue a warrant for the payment of a school voucher, its allowance must be proved by the record of that court or by a certified copy thereof.—*Brown v. Reese*, S. C. Tex., Feb. 4, 1887; 3 S. W. Rep. 292.

135. MARRIED WOMAN — Suretyship — Executory Contract.——In Indiana, a married woman is liable on her promissory note if given for personal property for her own use, provided the title is to be vested in her. And if, upon a suit upon her note, she pleads that she signed the note only as surety for another, a demurrer cannot be sustained to a reply that the consideration of the note was personal property purchased by and for her.—*Chandler v. Spencer*, S. C. Ind., Feb. 23, 1887; 10 N. E. Rep. 577.

136. MECHANIC'S LIEN—Costs.——A mere inchoate right to a mechanic's lien is not assignable. An assignment can only be made of a demand which has been perfected under the statute. When a suit might and should have been brought in a justice's court, but is brought in the district court, the plaintiff cannot recover costs.—*Goodman, etc. Co. v. Pence*, S. C. Neb., March 16, 1887; 32 N. W. Rep. 219.

137. MINING CLAIM—Adverse Claims—Jury Trial—Possession.——In a suit to determine the title of adverse claimants to a mining claim, it is immaterial who is in possession, and, under Idaho law, a jury trial is a matter of right; but where a jury trial is had, it is too late for the plaintiff to ask for a proceeding in equity because one of his causes of action is equitable. —*Burke v. McDonald*, S. C. Idaho, Feb. 28, 1887; 13 Pac. Rep. 351.

138. MORTGAGE—Consideration—Pleading—Notice. —A mortgage for a pre-existing debt is junior to a subsequent mortgage for purchase money, unless there has been a new note and an extension of time, which is a new consideration. An averment that a mortgage is superior to another incumbrance, asserts merely a conclusion of law, and, under it, proof of actual notice to the other party cannot be admitted. An agreement to make a mortgage is not good against a mortgage previously recorded, unless notice to the mortgagee is proved.—*Koon v. Tramel*, S. C. Iowa, March 8, 1887; 32 N. W. Rep. 243.

139. MORTGAGE—Husband and Wife — Pleading — Invalidity—Evidence.——In a suit to foreclose a mortgage, the wife of the mortgagor may allege in her answer that she did not execute it, and that her signature and acknowledgment were obtained by fraud, and evidence of the wife and others is admissible that complainant stated in their presence that she never agreed to give the mortgage.— *Genthner v. Fagan*, S. C. Tenn., 1887; 3 S. W. Rep. 351.

140. MORTGAGE—Possession by Mortgagee—Ejectment.——Under Montana law, a mortgagee cannot recover possession of the realty without a foreclosure, but by agreement, after the maturity of the debt, the mortgagee may enter and hold possession until the debt is paid.—*Fee v. Swingly*, S. C. Mont., Feb. 2, 1887; 13 Pac. Rep. 375.

141. MUNICIPAL CONTRACTS—Liability. —A city incurs no liability for work done under a void contract, and the California act, providing for payment of a street contractor out of funds of the city, when the assessment therefor is adjudged invalid, though no no fault of his, presupposes a valid and binding contract.—*Daly v. City of San Francisco*, S. C. Cal., March 16, 1887; 13 Pac. Rep. 321.

142. MUNICIPAL CORPORATIONS—Fire Ordinance—Constitutional Law.——A law of a municipality, requiring all changes of wooden buildings in the fire limits to be approved by the majority of the fire wardens, the mayor and the committee on the fire department, is not against the United States constitution.—*Ex parte Fiske*, S. C. Cal., March 7, 1887; 13 Pac. Rep. 310.

143. MUNICIPAL CORPORATIONS—Lease of Lots.— A town, by resolution, directed that its lots should be leased at public auction, but not at a time more than one year prior to the expiration of the lease in force. A later resolution authorized the proper officer to renew existing leases. *Held*, that those officers could not renew a lease at a time more than a year before its expiration.—*Tilyon v. Gravesend*, N. Y. Ct. App., Feb. 8, 1887; 10 N. E. Rep. 542.

144. MUNICIPAL CORPORATIONS — Licenses—Taxes —Foreign Companies.——Ordinarily a power to license useful trades given to a municipal corporation, does not imply a power to tax thereby, but it depends upon the meaning of the act; but such a local act will not, by implication, repeal a general act exempting foreign companies.—*Adams Ex. Co. v. City of Owensborough*, Ky. Ct. App., Feb. 24, 1887; 3 S. W. Rep. 370.

145. MUNICIPAL CORPORATIONS—Opening Alleys—Assessments.——Under Missouri law, a lot abutting upon an alley, to be intersected by a new alley, cannot be assessed for the opening of the new alley.—*City of St. Louis v. Juppier*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 401.

146. MUNICIPAL CORPORATIONS—Ordinance — Disorderly House.——An ordinance of a city that any one found in or frequenting a disorderly house shall be fined, is authorized by Iowa laws.—*State v. Botkin*, S. C. Iowa, March 5, 1887; 32 N. W. Rep. 185.

147. MUNICIPAL CORPORATIONS — Ordinance — Special Session of Council.——An ordinance of a city, passed at a special session of the council, *held*, void, because the subject was not specified by the mayor as one of the objects of the meeting, as required by the charter.—*City of St. Louis v. Withaus*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 395.

148. MUNICIPAL CORPORATIONS—Railroads—Crossing—Statutes.——Under the Illinois laws, cities and incorporated towns have the right to regulate the crossing of their streets by railroad tracks, and the officers of the counties in which they are situated have no right to interfere. Construction of Illinois statutes. —*County of Cook v. Great Western, etc. Co.*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 564.

149. MUNICIPAL CORPORATIONS — Street Improvements — Requirements — Damages. —— When a city changes the grade of a street without taking the proper legal steps prior thereto, a property owner whose lot is injured thereby may sue it for damages. —*Meinzer v. City of Racine*, S. C. Wis., March 1, 1887; 32 N. W. Rep. 139.

150. MURDER — Previous Acquittal — Evidence — Dying Declarations—Accessory.—— One convicted of murder in the second degree is acquitted of murder in the first degree, but upon a new trial on the same indictment he must plead the former acquittal, or he may be convicted of murder in the first degree. All the incidents on the same evening, leading up to the homicide, may be given in evidence. An accessory, jointly indicted with the principrl, cannot exclude evidence admissible against the principal but not against himself. He can have an instruction, however, excluding the application of such evidence to himself.— *Jordan v. State*, S. C. Ala., Feb. 17, 1887; 1 South. Rep. 577.

151. MUTUAL BENEFIT ASSOCIATION—Certificate—Change of Beneficiary.——A member of a mutual benefit association may at any time change the beneficiary under his certificate, and prior to his death his beneficiary has no vested interest therein.—*Schillinger v. Boes*, Ky. Ct. App., March 12, 1887; 3 S. W. Rep. 427.

152. NEGLIGENCE — Contributory — Defense. —— Where the defendant relies upon contributory negligence by the plaintiff, the burden is on him to prove it.—*Hopkins v. Utah, etc. R. Co.*, S. C. Idaho, Feb. 21, 1887; 13 Pac. Rep. 343.

153. NEGLIGENCE —Crossing — Notice.——Where a railroad is habitually crossed at a place, not a public crossing, without objection by the company, it is obliged to give a reasonable notice and warning of the approach of trains. An omission to do so is negligence, for which the company may be held liable.—

Byrne v. New York, etc. Co., N. Y. Ct. App., Feb. 8, 1887; 10 N. E. Rep. 539.

154. NEGLIGENCE—Evidence.——In a case in which a brakeman sustained injuries by falling into a cattle guard, it was held that the fact that there were other cattle guards much further from the track than the one in question, did not tend to prove that the space between the latter and the track was too small for safety.—*Robinson v. Chicago, etc. Co.*, S. C. Iowa, March 7, 1887; 32 N. W. Rep. 193.

155. NEGLIGENCE—Fencing Pond in City.——The owner of a lot in a town, on which surface water collects into a pond, is not bound to fence in the pond, nor liable for the death of a child who falls into the pond.—*Klix v. Nieman*, S. C. Wis., March 1, 1887; 32 N. W. Rep. 223.

156. NEGLIGENCE—Horse-car.——One who is thrown from a horse-car while standing on the platform, must show that while in that position she used due care.—*Lapointe v. Middlesex, etc. Co.*, S. J. C. Mass., Feb. 24, 1887; 10 N. E. Rep. 497.

157. NEGLIGENCE—Locomotive Sparks—Presumption—Evidence.——In an action against a railroad for injury from sparks from a locomotive, negligence will be presumed from proof of the accident and the injury, and the law requiring a railroad company to keep its right of way clear of combustible material is binding on it, and it is admissible to prove that about that time fire was scattered by the engines of the defendant.—*Diamond v. North. Pac. R. Co.*, S. C. Mont., Feb. 2, 1887; 13 Pac. Rep. 367.

158. NEGLIGENCE—Proxima Causa—Fellow-servant—Iowa statute.——If one who, to escape a train that started without signal, steps off the track to the side of a steep sand bank, which immediately begins to crumble upon him, and is then forced upon the track and is injured, he has no remedy against the railroad, as the falling of the bank is the *proxima causa* of the disaster. One whose business is to load and unload cars which pass to and from gravel pits, being exposed to the ordinary risks of his employment, is, under § 1307 of the Iowa code, entitled to a remedy for injuries caused by the negligence of co-employees.—*Handelun v. Burlington, etc. Co.*, S. C. Iowa, March 4, 1887; 32 N. W. Rep. 4.

159. NEGLIGENCE—Question for Jury—Dangerous Speed.——It is a question for the jury whether a train was running at a dangerous speed when it killed plaintiff's cow, and whether plaintiff was guilty of contributory negligence in turning his cow loose.—*Courson v. Chicago, etc. Co.*, S. C. Iowa, March 4, 1887; 32 N. W. Rep. 8.

160. NEGLIGENCE — Special Damage. —— Where a case is fully made out by the proof of liability of a defendant to the plaintiff for injuries caused by negligence, it is competent for the plaintiff, a mechanic, to show that, after the disaster, he could not obtain as good wages as before, and the jury may well consider such proof, although no allegation of special damages is made in the complaint.—*Conner v. Pioneer, etc. Co.*, U. S. C. C. (Minn.), Dec. 16. 1886; 29 Fed Rep. 629.

161. NEW TRIAL—Jury—Instructions.——It is error for a court to grant a new trial in a case in which the jury, disregarding an instruction that they could only give nominal damages, had given substantial damages, which the court of its own motion had reduced to one dollar.—*Morlan v. Russell*, S. C. Iowa, March 10, 1887; 32 N. W. Rep. 266.

162. NEW TRIAL—Jury — Misconduct.—— If papers concerning the questions at issue between the parties, which have not been admitted in evidence, came into the hands of the jury and are read by them and taken to the jury room, such misconduct on the part of the jury is sufficient to authorize a new trial, if the papers were of such a nature to have influenced the jury.—*McLeod v. Humeston*, S. C. Iowa, March 8, 1887; 32 N. W. Rep. 246.

163. OBSCENE PUBLICATIONS — Mail — Statute.—— A letter which is coarse, vulgar and libelous is not within U. S. Rev. Stat. § 3893, if it does not tend to "suggest libidinous thoughts or excite impure desires."—*United States v. Wightman*, U. S. D. C. (Penn.), Dec. 30, 1886; 29 Fed. Rep. 636.

164. PARTITION—Tenants in Common — Improvements—Rents and Profits.——One co-tenant will not usually be required to pay for improvements made without his assent by his co-tenant, yet, upon partition, the value of such improvements will be considered in favor of him who made them. A tenant in common is not liable for rents and profits, unless he has excluded his co-tenant. It is otherwise if for years he has been in possession, denying his co-tenant's title.—*Carver v. Coffman*, S. C. Ind.. Feb. 23, 1887; 10 N. E. Rep. 567.

165. PARTNERSHIP — Sale — Dissolution.——Where cattle are purchased for a partnership on money furnished by one of them to be owned in equal shares, if that partner merely sells his undivided interest in the cattle, he dissolves the partnership and loses his lien on his partner's interest, but he does not transfer any equity he may have against his partner.—*Moore v. Steele*, S. C. Tex., Feb. 25, 1887; 3 S. W. Rep. 448.

166. PARTNERSHIP — Secret — Ostensible. —— An ostensible partner is one who holds himself out as such, or knowingly permits the others to use his name as such to obtain credit. A secret partner is one who hides from the public the fact that he participates in the profits and losses.—*Harris v. Sessler*, S. C. Tex., Feb. 15, 1887; 3 S. W. Rep. 316.

167. PATENT—Invalid.—— Patents Nos. 283,931, and 257,326, for lubricators, held invalid, because anticipated.—*Swift v. Jenks*, U. S. C. C. (N. Y.), Jan. 31, 1887; 29 Fed. Rep. 642.

168. PATENTS — License — Infringement —— A licensee of a patent process is guilty of infringement if he sells to persons, not licensed, materials to be used in such process.—*Willis v. McCullen*, U. S. C. C. (Penn.), Dec. 8, 1886; 29 Fed. Rep. 641.

169. PAYMENT—Application. —— Where one owed to the same creditor a debt secured by mortgage and other unsecured debts, and made a general payment, not specifying to which of his debts it should be applied, the creditor had a right to apply it to the unsecured debts.—*Thatcher v. Massey*, S. C. S. Car., Feb. 24, 1887; 1 S. E. Rep. 465.

170. PAYMENT—Draft—Renewal — Guaranty — Executors—Statute.—— A draft given for an existing debt is merely a suspension of the debt, not a payment, until the draft itself is paid. And this is true, although the holder of the original draft marked it "paid and canceled." Where one guarantees the payment of a draft upon consideration that another will also guarantee it, and the other guarantees it, promis-

ing to pay it if neither the maker nor the first guarantor shall pay it, the first guarantor is not liable to one who had notice of the condition. Rulings on the presentation of claims agaidst estates and Illinois statute.—*Belleville, etc. Bank v. Bornman*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 552.

171. PHYSICIAN—Criminal Law—License—Statute.—A complaint charging that defendant practiced medicine, having registered as a physician, but being destitute of the qualifications prescribed by the statute, does not state facts which constitute an offense, under the law of Nebraska.—*Denton v. State*, S. C. Neb., March 16, 1887; 32 N. W. Rep. 222.

172. PLEADING—Amendment—Fraud.——In an action to set aside a deed for fraud, it was held competent to permit an amendment of the complaint after all the evidence had been given, which amendment set forth that the plaintiffs, husband and wife, were persons of feeble understanding and in financial distress.—*Clough v. Adams*, S. C. Iowa, March 3, 1887; 32 N. W. Rep. 10.

173. PLEADING—Partnership — Filing Certificate.—An objection that a partnership, doing business under a fictitious name, has not filed its certificate, must be made by the answer, or it is waived.—*Phillips v. Goldtree*, S. C. Cal., March 14, 1887; 13 Pac. Rep. 313.

174. PLEDGE—Mortgage Note.——The pledgee of a mortgage note has the right to sue upon the note in his own name for his benefit and that of the pledgor.—*Mechanic's, etc. Co. v. Lozano*, S. C. La., March 7, 1887; 1 South. Rep. 608.

175. POOR-LAWS — Jurisdiction — Statute. —— The poor-laws of Massachusetts construed. Jurisdiction of superior courts with reference to the poor defined.—*Inhabitants of Milford v. Commonwealth*, S. J. C. Mass., Feb. 26, 1887; 10 N. E. Rep. 516.

176. POST-OFFICE—Clerks.—— A postmaster cannot, without leave of the postmaster-general, employ clerks to do duty in the money order department and pay them out of government funds.— *United States v. Chase*, U. S. D. C. (N. Y.), Jan. 28, 1887; 29 Fed. Rep. 616.

177. PRACTICE—Appeal — Service of Notice.—— A service of the notice of appeal cannot be made by the appellant.—*Williams v. Schmidt*, S. C. Oreg., Feb. 7, 1887; 13 Pac. Rep. 305.

178. PRACTICE—Appearance—Constitutional Law.—The law, stating a defendant who appears to quash a a service on him, shall be held to have appeared at the next term, is constitutional.—*Central, etc. R. Co. v. Morris*, S. C. Tex., March 8, 1887; 3 S. W. Rep. 457.

179. PRACTICE—Conditional Sale—Replevin—Return of Notes.—In an action of replevin for breach of a conditional sale, plaintiff can maintain the action without first surrendering or offering to surrender defendant's notes for the property, when there is no agreement between the parties to that effect.—*Kirby v. Tompkins*, S. C. Ark., Feb. 19, 1887; 3 S. W. Rep. 363.

180. PRACTICE—Damages—Payment by Insurance Company—Abatement.——An action for damages for loss by fire, caused by defendant's negligence, may be prosecuted to final judgment, though an insurance company has paid for the loss.—*Nichols v. Chicago, etc. R. Co.*, S. C. Minn., Feb. 28, 1887; 32 N. W. Rep. 176.

181. PRACTICE—Misjoinder — Appeal — Waiver.—— An objection for misjoinder of defendants cannot be made for the first time in the appellate court.— *Tyler v. Tualtin, etc. University*, S. C. Oreg., Feb. 19, 1887; 13 Pac. Rep. 329.

182. PRACTICE—Appearance — Quashing Process—Amendment.——A motion to quash process, which is sustained, is an appearance. A suit filed for a minor may be amended by substituting the guardian as plaintiff, and where the defendant has appeared, the order of allowance is notice to him.—*Rabb v. Rogers*, S. C. Tex., Feb. 8, 1887; 3 S. W. Rep. 303.

183. PRACTICE — Reference — Nonsuit — Counterclaim.——A reference by consent does not place the case so far beyond the control of the court that it cannot hear a motion for a nonsuit, made by the plaintiff, who, however, cannot take a voluntary nonsuit if defendant has pleaded a counterclaim under N. C. Code, § 420, prov. 1, that is a demand growing out of the same transaction.—*McNeill v. Lawton*, S. C. N. C. March 16, 1887; 1 S. E. Rep. 493.

184. PROCESS — Immunity From.——One who in obedience to process has appeared in court as a defendant in a criminal case in a county other than that of his residence, and has been discharged, is exempt from the service of civil process in that county for a reasonable time, time enough for him to get out of it.—*Palmer v. Rowan*, S. C. Neb., March 10, 1887; 32 N. W. Rep. 210.

185. PROMISSORY NOTE — Notice of Protest—Reasonable Time.——When demand of payment of a promissory note is duly made on the last day of grace, and notice given on the next day to the indorser who lived within a few miles of the place of payment, it is within a reasonable time.—*Phelps v. Stocking*, S. C. Neb., March 16, 1887; 32 N. W. Rep. 217.

186. PROMISSORY NOTE — Payment.——One who makes a payment before maturity on a note secured by mortgage, cannot be entitled to a credit therefor against an assignee before maturity without notice and for value, although no assignment of the mortgage had been made.—*Brayley v. Ellis*, S. C. Iowa, March 9, 1887; 32 Fed. Rep. 254.

187. RAILROADS—Branch Lines.——Under the Pennsylvania act, the length of a branch line is left to the discretion of the company, and where there is no willful abuse of the power, the courts will not interfere.—*Vollmer's Appeal*, S. C. Penn., Feb. 14, 1887; 8 Atl. Rep. 223.

188. RAILROADS—Lease— Public Duties——A railroad cannot lease its road so as to release itself from its public obligations, unless the law authorizing the lease contains such a provision; a provision, that no lease shall be made to a competing road is a restriction and not a grant of power to make other leases.—*Central, etc. R. Co. v. Morris*, S. C. Tex., March 8, 1887; 3 S. W. Rep. 457.

189. RAILROADS—Crossing—Negligence— Highway.——A railroad company which digs a pit in the crossing of its track by a highway is bound to replace it and put it into a safe condition, and an omission to do so is negligence for which the company is liable.—*Washburn v. Chicago, etc. Co.*, S. C. Wis., March 22, 1887; 32 N. W. Rep. 234.

190. RAILROAD—Negligence.——A railroad company that has negligently permitted combustible substances to accumulate on its right of way is liable to an adjacent property owner, if fire communicated to such substances by the trains of the company, passes to the ad-

jacent lands and consumes the property of the proprietor, provided he has not been guilty of contibutory negligence.—*Indiana, etc. Co. v. Overman*, S. C. Ind., Feb. 19, 1887; 10 N. E. Rep. 575.

191. RAILROADS —Notices—Bondholders—Discrimination.——Notices for railroads may be given to the bondholders, when they are in possession thereof. A notice and a refusal to refund an overcharge are only required, under Texas law, when the charge exceeded the fifty cent rate.—*Woodhouse v. Rio Grande R. Co.*, S. C. Tex., Feb. 25, 1887; 3 S. W. Rep. 323.

192. RAILROADS — Pleading — Double Damage Act. ——In action, under the Missouri double damage act, for killing stock, the plaintiff's statement is fatally defective if it fails to allege that the cattle got on the track at a place where the road passed through or along inclosed lands, or uninclosed lands where the company was by law required to fence.—*Ward v. St. Louis, etc. Co.*, S. C. Mo., Feb. 28, 1887; 3 S. W. Rep. 481.

193. RAILROADS—Receivers.——When a railroad extending through several United States judicial circuits is operated by receivers appointed by the circuit court of one of those circuits, such receivers may be removed by the circuit court of another of those circuits *quoad* the part of the road lying within such latter circuit, and the receivers so removed will be ordered by the court which appointed them to transfer to the receiver appointed by the latter circuit court the control of the road within that circuit.—*Central, etc. Co. v. Wabash, etc. Co.*, U. S. C. C. (Mo.), Dec. 30, 1886; 29 Fed. Rep. 618.

194. RAILROADS—Taxation—Illinois Statute.——The statutes of Illinois, Act of 1883, § 83, relating to railroads, and revenue act, § 110, construed and applied. —*Ohio, etc. Co. v. People ex rel.*, S. C. Ill., Jan. 25, 1887; 10 N. E. Rep. 545.

195. RAILROADS—Trial—Jury—Instruction.——In a railroad negligence case, it is held that it is the province of the jury to decide whether the theory of the plaintiff or that of the defendant is best supported by the evidence. An instruction that the jury should consider what is, and what is not probable, is incorrect.—*Butler v. Chicago, etc. Co.*, S. C. Iowa, March 10, 1887; 32 N. W. Rep. 262.

196. RECORDER'S COURT—Jurisdiction.——The recorder's court of Hannibal was not abolished by the Missouri constitution of 1875. It can hear and determine actions for the recovery of personal property, where the amount in controversy does not exceed one hundred dollars.—*Cake v. White*, S. C. Mo., Feb. 28, 1887; 3 S. W. Rep. 486.

197. RECOUPMENT—Warranty—Damages—Fraud. ——A defendant may recoup diminished value of goods and positive damages growing out of breach of warranty. Such defense only reduces damages, and does not authorize an affirmative judgment. Only matters of contract are grounds for counterclaim.—*Dushane v. Benedict*, U. S. S. C., March 14, 1887; 7 S. C. Rep. 696.

198. REGISTRATION—Bona Fide Purchaser—Judgment Creditor — Quitclaim. —— A purchase by the judgment creditor in attachment proceedings does not make him a *bona fide* holder, and so with one who buys by quitclaim. In both cases they take only the actual title of their grantor.—*McAdon v. Black*, S. C. Mont., Feb. 2, 1887; 13 Pac. Rep. 377.

199. REPLEVIN—Bail — Surety. — A replevin bail who has paid the debt may have execution on the judgment against all the judgment defendants, including a surety whom he knew to be such, unless the surety had, when the judgment was rendered, the question of his suretyship tried and determined.—*Dessar v. King*, S. C. Ind., Jan. 25, 1887; 10 N. E. Rep. 621.

200. SALE—Action—Assignment of Stock—Evidence. —Where, in an action to recover the price of goods sold, and it is pleaded that payment was made by an assignment of stock, plaintiff may show by oral evidence that the stock was assigned as a security only, although absolute on its face, and the action may be maintained, although the stock has not been tendered back.—*Bulman v. Howell*, S. J. C. Mass., Feb. 25, 1887; 10 N. E. Rep. 504.

201. SALE—Implied Warranty.—— Where a manufacturer agrees to furnish goods for a particular purpose, and the vendee has no opportunity to examine them beforehand, there is an implied warranty by the manufacturer that the goods shall be merchantable and suitable for the purpose for which they are purchased.—*Curtis, etc. Co. v. Williams*, S. C. Ark., Feb. 26, 1887; 3 S. W. Rep. 517.

202. SALE — Warranty. —— One who purchases a chattel, warranted, but in the written contract is bound to give notice of breach of warranty to the vendor, cannot resist the collection of the purchase money on the ground of a breach of warranty, of which no such notice was given. If there is a written warranty, the purchaser cannot give evidence of oral warranty as an addition or a substitute.—*Nicholas v. Wayman*, S. C. Iowa, March 9, 1887; 32 N. W. Rep. 258.

203. SCHOOLS—Incorporated Town—Conveyance.— An incorporated town succeeds to the rights of the township in reference to school property, which is always held in trust for school purposes.—*School Township of Allen v. School Town of Macy*, S. C. Ind., Feb. 24, 1887; 10 N. E. Rep. 578.

204. SCHOOLS—Superintendent — Correction of Errors.——A superintendent of public schools may recall and reverse a decision made by him through mistake, or imperfect information as to facts.—*Desmond v. Independent School District*, S. C. Iowa, March 4, 1887; 32 N. W. Rep. 6.

205. SERVICE—Return of—Jurat — Affiant's Name. ——An affidavit of a service of notice will not be held defective in the absence of a statute requiring it, because the *jurat* does not contain the affiant's name—*Kirby v. Gates*, S. C. Iowa, March 7, 1887; 32 N. W. Rep. 191.

206. SUBROGATION—Volunteer.——One who voluntarily pays the debt of another, for which neither he nor his property is liable, has no right of subrogation. —*Flannery v. Utley*, Ky. Ct. App., March 3, 1887; 3 S. W. Rep. 412.

207. SURETY—Subrogation—Staying Execution.—— Where a party becomes surety for stay of execution in three separate suits against the maker and two indorsers of a note, with the consent of all parties, upon payment of the judgment he is subrogated to the rights of the plaintiffs.—*Yeager's Appeal*, S. C. Penn., Feb. 14, 1887; 8 Atl. Rep. 225.

208. TAXATION—Exemption — Railroads — Missouri Statute.——Exemption from taxation, to be valid, must be granted in unmistakable terms. Construction of Missouri statute of March 21, 1868, regulating branch railroads. When a branch railroad in Missour

is to be regarded as an independent railroad, and when it loses its exemption from taxation.—*Chicago, etc. Co. v. Missouri*, U. S. S. C., March 7, 1887; 7 S. C. Rep. 693.

209. TAXATION—Redemption — Notice — Mistake — Statute.——Under Iowa statutes, a notice of the expiration of the time for redemption of land sold for taxes must be given, and if, in such notice, a mistake is made, the time for redemption is not terminated by the notice.—Construction of Iowa statutes on the subject.—*Slyfield v. Barnum*, S. C. Iowa, March 11, 1887; 31 N. W. Rep. 270.

210. TAXATION—Sale— Notice—Redemption.——Assignees of the interest of the State before forfeiture are affected by the act requiring notice of the expiration of the time of redemption for taxes, but assignees of the interest of the State after forfeiture are not. The extension of the time of redemption to three years is inapplicable to unforfeited lands held by the State and not yet assigned.—*State v. Smith*, S. C. Minn., Feb. 28, 1887; 32 N. W. Rep. 174.

211. TAX-DEED—Redemption — Title—Statute.—— Construction of Iowa statutes concerning taxation, tax-deeds redemption, and proceedings relative to those subjects.—*Bowers v. Hallock*, S. C. Iowa, March 10, 1887; 32 N. W. Rep. 268.

212. TAX-SALE— Apparent Owner — Plat-book — Non-resident.——A sale of land for taxes under proceedings against the owner of the property, as appears by the plat-book in the county clerk's office, certified by the register of the United States land-office, is valid in the absence of knowledge that such party had parted with the title. If the petition alleges non-residence of the owner, such sale is valid after notice by publication, though such owner was a resident, if the purchaser was not aware of it.—*Payne v. Lot*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 402.

213. TELEGRAPH COMPANIES—Limiting Liability—Negligence.——A telegraph company in limiting its liability for night or half-rate messages cannot avoid its liability for the negligence of its employees. But one who knew of the mistake in time to have remedied it is not entitled to damages on account of it.—*Marr v. Western, etc. Co.*, S. C. Tenn., March 8, 1887; 3 S. W. Rep. 496.

214. TENANTS IN COMMON—Sheep—Attachment.—— Where a party agrees to take care of sheep for one half of the increase receivable at the end of the term and one-half of the wool, he is tenant in common of the wool, and his interest is attachable.—*Beezley v. Crossen*, S. C. Oreg., Feb. 7, 1887; 13 Pac. Rep. 306.

215. TRESPASS—Third Parties—Tenants in Common. ——Where by agreement one tenant in common is allowed the exclusive use and possession of land held in common, he may sue for an injury done to such land. —*Gulf, etc. R. Co. v. Wheat*, S. C. Tex., March 11, 1887; 3 S. W. Rep. 455.

216. TRIAL —Instruction.——Where the facts of a case are undisputed, the court may give a peremptory instruction to the jury.—*Hall v. Durham*, S. C. Ind., Feb. 25, 1887; 10 N. E. Rep. 581.

217. TRIAL—New Trial —Evidence—Counterclaim—Contributory Negligence.——When it conclusively appears to the court that the plaintiff's evidence does not sustain his complaint, the case should not be submitted to the jury. One who has moved machinery into a building covered by a new roof that leaked from its first construction, cannot set up as a counterclaim damage to the machinery caused by the leaking. He has been guilty of contributory negligence.—*Muth v. Frost*, S. C. Wis., March 22, 1887; 32 N. W. Rep. 231.

218. TRUST— Purchase Money.——One who advanced $300 in part payment for a house for his father, the remainder $2,000 being advanced by his brother who took the title to himself, has no rights as against the executors of his brother except for a return of his $300, the executors having sold the land and the father being only a tenant at will.—*Darlington v. Darlington*, S. C. Penn., Feb. 21, 1887; 8 Atl. Rep. 419.

219. TRUST—Resulting—Evidence.——The evidence to establish a resulting trust must be clear, positive and definite.—*Philpot v. Penn.*, S. C. Mo., Feb. 14, 1887; 3 S. W. Rep. 386.

220. TRUST—Trustee Selling to Himself—Purchaser. ——A trustee with power of sale cannot sell to himself so as to divest the title of the *cestui que trust*. The trustee or those claiming under him must show the facts, if any such there be, which validate the sale. If the trust is matter of record, it is unnecessary to allege that the purchaser from the trustee knew the terms of the trust.—*De Everett v. Henry*, S. C. Tex., Feb. 18, 1887; 3 S. W. Rep. 566.

221. VENDOR—Acts of Vendee — Paramount Title. ——A vendor of land, bought by him at a tax-sale, is not liable to the owner of the paramount title, who afterwards defeated the tax-title, for the acts of the vendee.—*McClanahan v. Stephens*, S. C. Tex., Feb. 11, 1887; 3 S. W. Rep. 312.

222. VENDOR AND VENDEE — Parol Contract for Land—Disaffirmance—Consideration.——In an action for the consideration paid on a parol contract for the sale of land, which both parties disaffimed, it is no defense to claim that vendor was to retain the consideration for releasing the vendee from his contract.—*Shuder v. Newby*, S. C. Tenn., Jan. 19, 1887; 3 S. W. Rep. 438.

223. VENDOR AND VENDEE — Ratification.——A vendee who pays interest on a note made by his vendor in the hands of a third person in pursuance of a contract made by him before the sale, does not thereby preclude himself from prosecuting a suit for a rescission of the sale. An act from which a ratification is sought to be deduced must evince an intention to ratify clearly and equivocally.—*Breaux v. Savoie*, S. C. La., March 7, 1887; 1 South. Rep. 614.

224. VENDOR AND VENDEE —Escrow — Statute of Frauds.——Where a deed for land is made and delivered to a third party, to be delivered when payment is made, and the vendee is put in possession and tenders the money within four days, nothing being said in the contract of sale as to time of payment, the deed cannot be revoked by the grantor, and the purchaser is not bound to keep the tender good, and a subsequent purchaser with notice must surrender the land. An oral contract of sale, when a deed is put in escrow, is not within the statute of frauds.—*Cannon v. Handley*, S. C. Cal., March 16, 1887; 13 Pac. Rep. 315.

225. VENUE—Contract—Performance — Statute.—— In Iowa, by statute an action may be brought in the county in which by the terms of a written contract it is to be performed. In the absence of a statute the law would imply that an action may be bought in the county in which delivery of chattels sold is to be made.—*Fort Dodge, etc. Co. v. Willis*, S. C. Iowa, March 9, 1887; 32 N. W. Rep. 253.

226. VERDICT— Mistake—Correction.——A mistake

in a verdict may be corrected by the judge so as to make the record conform to the verdict actually rendered. The matter, however, rests in the discretion of the trial judge, and as the evidence does not appear in the record, no inquiries into the matter can be made upon appeal.—*Cohn v. Scheuer*, S. C. Penn., Feb, 14, 1887; 8 Atl. Rep. 421.

227. WAYS—Highways—Private Ways—Instruction.——Where in a proceeding to open a highway in an issue submitted to a jury the words "for the public" were omitted, it was held that the court will supply them. In a question whether a public road should be opened, it is admissible to prove that certain private ways were open, or whether their owners had closed them. The mere omission of the judge to give a certain instruction is not ground for a new trial, unless his attention had been called to the subject.—*King v. Blackwell*, S. C. N. E., March 10, 1887; 1 S. E. Rep. 485.

228. WAYS — Practice — Appeal—Notice—Service—Iowa Statute.——A notice of appeal served on a county auditor in case of proceedings to establish a highway is not sufficient. Under Iowa code, § 2610, an action against the board of supervisors about a road is not such an action against the county as would authorize the notice of appeal to be served upon the county auditor.—*Polk v. Foster*, S. C. Iowa, March 4, 1887; 32 N. W. Rep. 7.

229. WILLS—Burden of Proof.——On the trial of the issue *devisavit vel non* the burden of the proof to the conclusion of the trial is on the contestants, and they are entitled to the closing argument to the jury.—*Blume v. Hartman*, S. C. Penn., Jan. 3, 1887; 8 Atl. Rep. 219.

230. WILLS — Probate — Appeal — Objections. —— When the only objection taken to the probate of a will was the incompetency of the testator, questions relating to its due execution will not be cousidered on appeal.—*Kile v. Wilhoit*, S. C. Cal., March 16, 1887; 13 Pac. Rep. 320.

231. WITNESS—Accused as Witness.——When a defendant elects to testify in his own behalf and denies utterly all violation of the law in the matter charged against him, he is entitled to an instruction that, if the jury believe his testimony to be true, they must acquit him.— *State v. Gilmore*, S. C. N. Car., March 16, 1887; 1 S. E. Rep. 491.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query No. 22.—What are the names, number and nature of the present courts of law and equity in France, and especially what court has charge of matters of probate in and about Paris? What is the mode of enforcing claims of non-resident heirs against estates in process of administration? An early answer is especially desired. R.

QUERIES ANSWERED.

Query No. 29 [23 Cent. L. J. 455.]—"I give and devise the house and lot on Ninth street, in the City of N., to John Thompson, in trust for the sole and separate use of my daughter Kate, and the said trustee or any successor, in the life-time of said Kate, with her consent, or afterwards, may sell the said house and lot at public or private sale, and on such terms of payment as the person selling may deem best, and hold and dispose of the proceeds of sale on the same trusts as the property was held before sale." What interest does the daughter Kate take in the house and lot by virtue of the above provision of a will? If she takes but a life estate, would the property at her death go to her children, or to her brothers and sisters?

Answer. The courts endeavor to construe a devise as conveying a fee if possible. 1 Redfield on Wills 420. In this case, in the absence of a State statute altering the rule, the daughter receives only a life estate. 2 Redfield on Wills 321, 344. Upon the death of the daughter, if the will made no further disposition of this property, it or its proceeds go to the heirs of the father, whosoever they may be under the State law.

J. B.

RECENT PUBLICATIONS.

THE LAW OF CONTRACTS. By J. I. Clark Hare, LL.D. Boston: Lttle, Brown, and Company. 1887.

This is a very learned and philosophical work, treating the law of contract from a standpoint somewhat different from that usually assumed by text-writers. Dr. Hare is not content with merely accepting received dogmas, he investigates their reason and traces them to their origin. He examines with much care the theories of the Roman law and of those systems founded upon it, so far as they relate to the law of contracts, and contrasts them with the common law doctrine, of which consideration is the chief cornerstone. In the Roman theories of the law of contract, consideration was an element of slight moment. From this vital difference of the two systems result as consequences important variations of doctrine and rules of construction, which Dr. Hare points out with much acumen and careful analysis, tracing them upward to their source, and downward to the minute discrepancies apparent in the practical workings of each system.

The author, however, does not confine himself to the philosophy of the laws governing the obligation of contracts, but discusses throughout the greater part of his work themes of a more practical description, susceptible of direct application to the administration of the law; express and implied promises, consideration antecedent and concurrent, moral obligation as an element of contract, ratification, waiver, mutality, sales, generally, of specific goods, by description, and by sample. There is a chapter devoted to the subject of warranty, another to the remedies of the vendee, and still another to performance, which may be denominated in Tony Lumpkin's phrase, "the cream of the correspondence." Other topics thorougly treated are, the relations of obligations to each other, as dependent and independent, their intrinsic character as entire or divisible, and finally of impossibility of performance, as affecting the obligation of contracts.

This work will hardly meet the views of the *mere* case-lawyer who is always content with a "the court holds," and deems every thing else surplusage, but will be exceedingly valuable to him who will not do one thing and leave the other undone, who is not content with mere results, but seeks also to trace them to their causes in the philosophy of jurisprudence.

The book is unusually well gotten up, typographically, and in every respect unexceptionable.